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REPORTS OF CASES

DECIDED IN THE

2531

COURT OF APPEAL,

DURING PARTS OF THE YEARS 1881 AND 1882.

REPORTED UNDER THE AUTHORITY OF

THE LAW SOCIETY OF UPPER CANADA.

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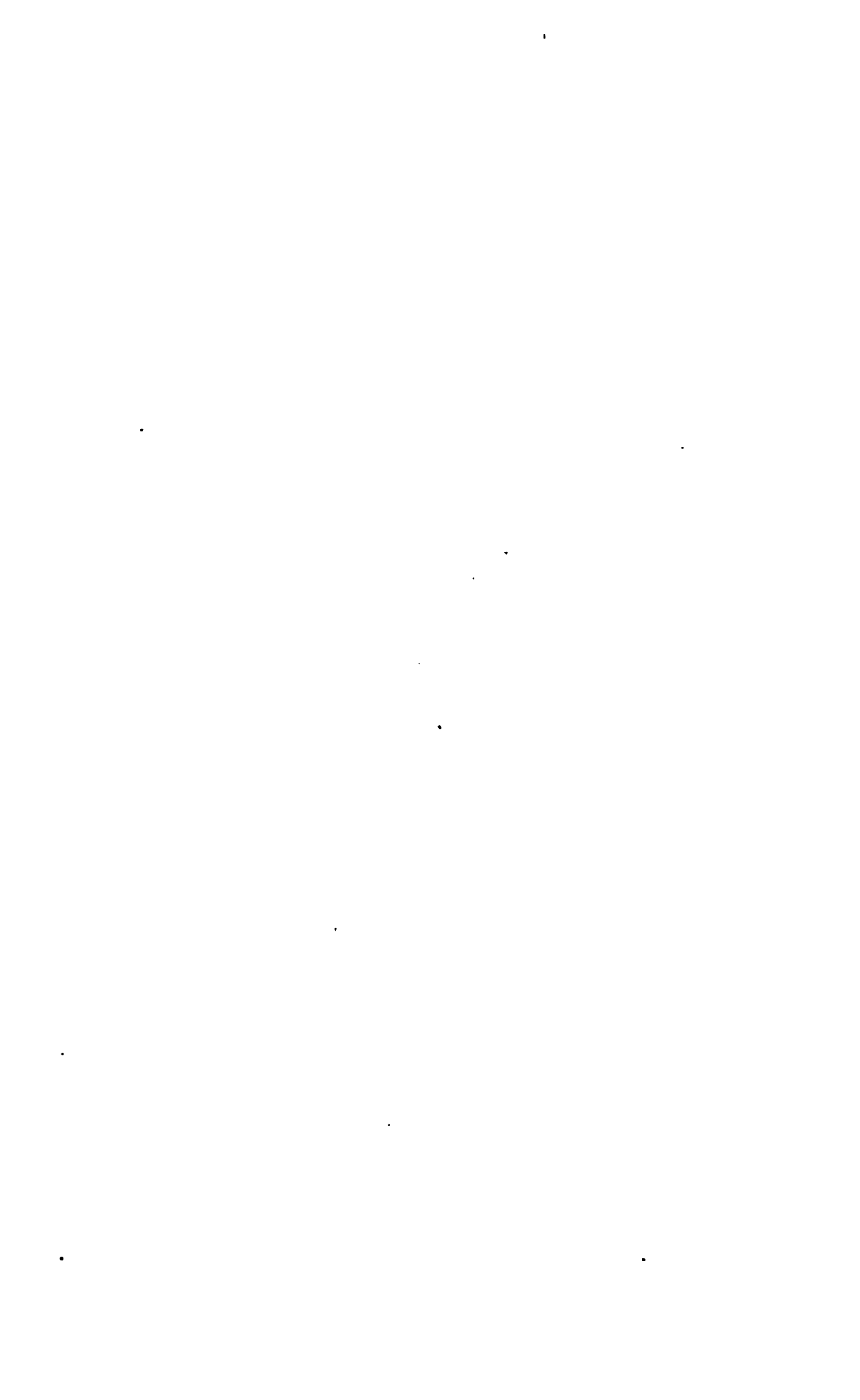
ENTERED according to the Act of the Parliament of Canada, in the year
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JUDGES
OF THE
COURT OF APPEAL

DURING THE PERIOD OF THESE REPORTS.

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ONTARIO APPEAL REPORTS.

PAGE ET AL. V. AUSTIN.

Sci. fa—Shareholder—Joint Stock Company—Illegally issued stock.

The Ontario Wood Pavement Company, incorporated under 27-28 Victoria, ch. 23, with power to increase by by-law the capital stock of the company so soon as, but not before, the original stock was all allotted and paid up, assumed to pass a by-law increasing the capital stock before the original amount had been paid up. The plaintiffs, execution creditors of the company whose writ had been returned unsatisfied, instituted proceedings by way of *sci. fa.* against the defendant as holder of shares of the new or increased capital stock.

Held, [reversing the judgment of the Court below] that the by-law so passed by the company being *ultra vires*, the alleged shares of the defendant had not any existence in law, and therefore that the plaintiffs failed to establish that the defendant was a shareholder within the statute, and consequently they were not entitled to recover; but the appeal being allowed on a ground not taken in the Court below or assigned as a reason of appeal, the Court refused the appellant his costs in appeal.

And *per* CAMERON, J.—*Quære*, whether the defendant might not have shewn that the transfer to him had been made by way of security only so that he was not a shareholder within the words of the statute, and therefore not liable for calls.

THIS was an appeal by the defendant from the judgment of the Court of Common Pleas, as reported 30 C. P. page 108.

The suit in the Court below was by a proceeding in the nature of a *scire facias*, the declaration in which was filed the 5th October, 1875, setting forth that the plaintiffs, George T. Page, Edward H. Kiddes, and Isaac D. Fletcher, by Newman Wright Hoyles, their attorney, sued out a writ of *scire facias* against James Austin, as follows :

IN THE COMMON PLEAS.

ONTARIO, COUNTY OF YORK, To WIT :	}	VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, &c.
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To James Austin, of the City of Toronto, in the County of York, greeting :

Whereas George S. Page, Edward H. Kiddes and Isaac D. Fletcher lately, on the twenty-eighth day of July, in the year of our Lord one thousand eight hundred and seventy-four, in our Court of Common Pleas at Toronto, by the judgment of the same Court against "The Ontario Wood Pavement Company of Toronto," incorporated under and by virtue of the Statute of the late Province of Canada, made and passed in the twenty-seventh and twenty-eighth years of our reign, chaptered 23, for the sum of fifteen hundred and ninety-seven dollars and ninety-one cents, which in our said Court was adjudged to the said George S. Page, Edward H. Kiddes and Isaac D. Fletcher for the damages they had sustained, as well on the occasion of the not performing of certain promises before then made to them by the said "The Ontario Wood Pavement Company, of Toronto," as for their costs of suit in that behalf expended—whereof the said "The Ontario Wood Pavement Company, of Toronto," are convicted, as appears to us of record.

And whereas, according to the provisions of the said Act, every shareholder in said company or corporation is, until the whole amount of his stock has been paid, individually liable to the creditors of the company or corporation to an amount equal to that not paid up thereon, but shall not be liable to an action therefor by any creditor before an execution against the company has been returned unsatisfied in whole or in part, and the amount due on such execution shall be the amount recovered with costs against such shareholder.

And whereas you, James Austin, are a stockholder in the said "The Ontario Wood Pavement Company, of Toronto," to the extent of one hundred and eleven shares of the capital stock of the said company of one hundred dollars each.

And whereas there is still due and unpaid by you, the said James Austin, on the capital stock of the said company, the sum of eight thousand eight hundred and eighty dollars or thereabout : And whereas a writ of *fiery facias* at the suit of the said George S. Page, Edward H. Kiddes, and Isaac D. Fletcher, against the goods and chattels of the said company, was issued out of our said Court of Common Pleas on the said judgment to recover the amount thereof, directed to the Sheriff of the County of York, in which said county the said company carried on its said business, which said writ of *fiery facias* has been returned "*nulla bona*" by the said Sheriff, and so that the said George S. Page, Edward H. Kiddes, and Isaac D. Fletcher have not yet been satisfied the damages and costs aforesaid. Wherefore the said George S. Page, Edward H. Kiddes, and Isaac D. Fletcher have humbly sought us to provide therein a proper remedy in their behalf ; and we being willing that what is just and right in this behalf should be done :—

We command you, the said James Austin, that within ten days after the service of this writ upon you, inclusive of the day of such service, you appear in our Court of Common Pleas to show cause why the said George S. Page, Edward H. Kidder, and Isaac D. Fletcher should not have execution against you for the damages and costs aforesaid, with interest thereon at the rate of six per cent. per annum from the said twenty-eighth day of July, in the year of our Lord one thousand eight hundred and seventy-four, on which day the judgment aforesaid was entered up, according to the force, form, and effect of the said recovery, if it shall seem expedient for you so to do. And take notice that in default of your so doing, the said George S. Page, Edward H. Kidder, and Isaac D. Fletcher may proceed to execution.

Witness, &c.

And that the said James Austin has appeared to the said writ. And the said George S. Page, Edward H. Kidder, and Isaac D. Fletcher pray that execution may be adjudged to them against the said James Austin of the said judgment, according to the force, form and effect of the said recovery and of the statute in that behalf, to the extent of the moneys remaining to be paid on and in respect of the said James Austin's shares in the said company towards the capital of the said company.

On the 28th of March, 1876, the defendant pleaded six several pleas to the declaration which, together with the principal points of the evidence taken in the cause, are clearly stated in the report of the case in the Common Pleas, and in *Scales v. Irwin*, 34 U. C. R. 545, a suit arising out of the dealings of the same company.

The cause came on to be argued before the Court* on the 10th day of March and 10th day of June, 1880, and again for further argument on the 13th day of June, 1881.

C. Robinson, Q. C., and *J. MacLennan*, Q. C., for the appellant.

Bethune, Q. C., for the respondents.

The grounds upon which it was insisted the appeal should be allowed were, in substance, that the stock was shewn by the books of the company to have been fully paid up, and the certificate delivered to the appellant by the company was to that effect: that the onus was thus cast on the respondents of proving that it was not paid up, and they had failed to do so: that under the Act stock is

*Present—BURTON, PATTERSON, MORRISON, J. J. A., and CAMERON, J.

not required to be paid up in any particular manner; it is matter of agreement between the company and the shareholder, and it is for the company to say what equivalent they will accept for stock, whether money or money's worth, property, services, &c.; and it was not proved that in some way or other the stock in question was not paid and satisfied to the company; and that if as between the shareholder and the company the stock is paid up or satisfied, there is no principle on which it can be questioned by a creditor; and even if questionable for want of *bona fides* as between the company and a shareholder, it is not so as against a transferee for value in good faith without notice.

Here the defendant had no notice that the shares were not fully paid up. The result of his inquiries and the authoritative information of the books were the other way, and he was confirmed in this opinion by the scrip issued to him by the company; and it is sufficiently shewn that the stock was held by the defendant as security only, and he is therefore protected by section 29 of the Act, 27-28 Vic. ch. 23. That the judgment in the Court below was erroneous, as it proceeds on the assumption that the Act required the fact of the stock being held as security to be in writing and to be entered in the company's books; but there is no such express requirement in the statute, nor does the law require it; all the statute requires is the fact, not that the fact should be evidenced in any particular way, and if the Legislature had so intended, it would have said so expressly in section 19.

It is evident that the intention of the Legislature was to make beneficial ownership the test of liability to creditors, and is expressed in section 29 in the most general terms. This is a natural, intelligible principle, easily applied and easily understood; and if the views of the Court below were to be enforced they would be productive of inconvenience and injustice, and would interfere with that freedom in the use of property which is required for the facilitating of commercial transactions.

In support of the judgment it was insisted that Arthurs, mentioned in the evidence, was the holder of the shares in respect of which the action was brought—part of such shares standing in his own name and part in the name of one William J. Atwell—but nothing beyond the first 10 per cent. thereon had been paid, and these same shares were transferred to the appellant, who accepted the transfer thereof.

It was also contended that the appellant was not a purchaser of the shares for value without notice, and could not protect himself against liability for the amount due in respect of them; and it was evident that the appellant did not rely upon any entries in the books of the company so as to entitle him to set these up as evidence in his favour; but even if he had relied on such entries it was clear that, apart from the entries in the books, the stock was not paid for, and that the appellant knew it.

The cases cited are mentioned in the report of the case in the Court below and in the judgments:

March 24th, 1882. BURTON, J. A.—The defendant is sued in this proceeding by a judgment creditor of the Ontario Wood Pavement Company, whose execution was returned unsatisfied. It was claimed that the shares which had been transferred to the defendant by a transfer, absolute in form, but which was intended to be as security only, were issued as paid up stock to some of the contractors. It was not made very apparent upon the first argument how this was; but after the argument Mr. Justice Cameron sent for the transfer book, from which it clearly appears that the stock held by the defendant consists wholly of new stock under the by-law of the 6th February, 1871, which recited that the whole of the original capital stock, amounting to \$130,000, had been allotted and paid in, and that the company had determined to increase the capital stock to \$250,000, and enacted that it should be increased accordingly.

Of the original stock of \$130,000, \$70,000 was first

subscribed, and \$7,000, or 10 per cent., paid. The subscription was subsequently made up to the full amount, of which the patentee took 920 shares, and in consideration of the other shareholders paying an additional 10 per cent. they agreed to pay up the balance of their shares.

This was carried out in the manner described in *Scales v. Irwin*, reported in 34 U. C. R. 545.

In point of fact then the recital was untrue. The original stock was not fully paid up, and the right to pass the by-law increasing the capital stock never arose.

The question is, how far the present defendant, who pleads that he never was a stockholder, is in a position to raise that defence.

The power of the directors to increase the capital stock is derived from sub-secs. 16, 17 and 18, of sec. 5 of the Act 27th and 28th Victoria, ch. 23, and arises only after the whole capital stock has been allotted and paid in, but not sooner, so that the by-law itself was in excess of the power of the directors; and it would seem by the 18th sub-sec. that the by-law, even when passed, is not to have any force or effect whatever until after it has been sanctioned by a two-thirds vote of the shareholders at a meeting duly called, nor until a copy has been filed with the Provincial Secretary and notice under his signature inserted in the *Gazette*, and from that time the new stock becomes subject to all the provisions of law in like manner as though the same had formed part of the stock of the company originally subscribed.

The directors had no power to issue these shares, and there is no proof of the steps preliminary to the by-law becoming operative having been taken; and no shares having been legally issued, it is impossible to say that the defendant was a shareholder unless on the ground of estoppel.

It was said, however, that the defendant having accepted the transfer was estopped from questioning the legality of the issue.

A party is only estopped from shewing the truth where

he has by some act or declaration acquiesced in an assumed state of things, and by such acquiescence the situation of the other party has been altered to his prejudice.

For instance, if in the present case the defendant had known all about the manner in which this increased stock had been issued, and with that knowledge accepted the transfer and received dividends, it might well be that he might be estopped from setting up the want of power in the directors as a defence in an action by the company, or on an application to place him on the list as a contributory on a winding up, but nothing of that kind is established here.

But it is not to be overlooked that the plaintiff here is pursuing the statutory remedy given by the 27th and 28th Victoria, ch. 23, sec. 27, and the question is not whether the defendant has so conducted himself as to leave it to be supposed that he is a shareholder, but whether he is a shareholder in the strictest sense of that term.

Under a similar enactment in England, 7 George IV., ch. 46, it was held that a creditor seeking to derive a benefit under it must shew that his comes precisely within the words of it, and that the Court were not at liberty to create an equity as it were arising out of the statute, and to say that every person who might be sued in consequence of representations or conduct tending to shew that he was a shareholder, and which as against him would be evidence that he was such, could be considered as a member for this proceeding by *scire facias*. (See *Ness v. Angus*, 3 Ex. 811; and *Ness v. Armstrong*, 4 Ex. 21.)

I have referred to the cases cited by Mr. Bethune, in the American Courts, but they are all distinguishable from this.

In *Upton v. Hansborough* (3 Biss. 417), the action was by the assignee in bankruptcy of the corporation, and it was there held that a person who had voluntarily taken stock was estopped from questioning the right of the company to issue the stock.

In the case of *Eaton v. Aspinwall*, 6 Duer 181, the shareholders were, by the terms of the Act of the State of

New York, under which they were incorporated, individually liable to the creditors, even though their own shares were fully paid up, until the whole amount of the capital was paid in. The defendant there was found to be a shareholder in fact. I assume, though that is not shewn, that the proceeding was similar to our own proceeding by *scire facias*, and the Judge did, it is true, express an opinion that a party may be estopped from saying that he is not a shareholder if he has openly avowed himself as a stockholder and taken part in the management of the company. The distinction between proceedings by the company, or on a winding up, and this statutory remedy was not adverted to, and the English cases referred to in the judgment do not assist, as they were cases of unincorporated associations where the ordinary law of partnership applied. Some of the other cases bear upon the question of the liability of a transferee who has taken the transfer merely as a security—a question we have not deemed it necessary to consider.

On the ground that the plaintiff here is asking for a statutory remedy against a shareholder, and has failed to shew that the defendant comes within the statutory definition, I think the case fails, and it becomes unnecessary to consider the points argued upon the appeal as opened.

The defendant is entitled, upon this objection, to have the judgment reversed and this appeal allowed; but as the point on which we have decided the case was not taken in the Court below or in the reasons of appeal, it should be without costs.

PATTERSON, J. A.—This appeal turns upon a question not raised in the Court below, and only suggested after the first argument before us. Had we only to consider the questions dealt with in the Court below, my present opinion is that we ought to dismiss the appeal. The consideration which I have given to those questions has not led me to doubt the correctness of the judgment

pronounced upon them. I cannot say, however, that I have considered them as maturely as if they were now to govern our decision.

Upon the newly suggested point, viz., the status of the defendant as a shareholder, I do not see how the plaintiff can succeed.

It is plain from the evidence in *Scales v. Irwin*, 34 U. C. R. 545, which is taken as evidence in this case, that the original nominal capital of \$130,000 was never paid. The power to make a by-law for increasing the capital stock was, by sub-sec. 16 of sec. 5 of the statute 27 and 28 Victoria, ch. 23, to arise "after the whole capital stock of the company shall have been allotted and paid in, but not sooner."

It also appeared from an examination of the books of the company, and the correctness of the deduction has not been impugned, that the company assumed to increase the capital, notwithstanding that the original capital had not been paid, and that the shares alleged to be held by the defendant are shares of the increased capital, and not of that originally authorized.

It seems to have been well settled by English decisions, under statutory provisions resembling those of sub-sec. 27, under which this action is brought, that the person sought to be made liable must be shewn to be in reality a shareholder. None of those cases involved circumstances like those now before us. They generally turned upon the absence of some act or formality necessary to have been done by the defendant himself or by the officers of the company, in order to constitute the status of shareholder under the statutes in question.

Now, this defendant has done everything necessary on his part, and no formality touching his particular case appears to have been omitted by the officers of the company; the objection is, that the stock for which he or his assignor subscribed had no legal existence. I have not been able to find a good answer to this objection, and therefore I agree we must allow the appeal, and that the appellant is not entitled to costs.

CAMERON, J., concurred in allowing the appeal, and under the circumstances, without costs. He did so without considering as fully as he might otherwise have done whether the defendant might not have shewn that in reality he was a mortgagee, and therefore under the express words of the Statute he was not a shareholder, and so not liable to calls.

CARLISLE V. TAIT.

Chattel mortgage—Agent of mortgagee—Affidavit of bona fides—Purchaser from mortgagee—Refiling mortgage—Registering bill of sale from mortgagee.

B., the customer of a bank, executed a chattel mortgage on his household effects, by way of collateral security, in favour of the bank, which was allowed to run into default, whereupon the mortgagees proceeded to a sale, and appointed W., their bailiff for that purpose, who had the property appraised and sold it to the plaintiff, a creditor of B., by private sale, for \$900; and executed a bill of sale thereof. The plaintiff, in his evidence, swore that B. owed him about \$1,000, and he thought there was ample security for the \$900 and also additional security for B.'s indebtedness to himself, and that the goods seemed to be worth about \$5,000; and the plaintiff, without disturbing in any way the possession of B., rented the property to him, and he remained, as he had theretofore been, in possession.

In order effectually to carry out the proposed arrangement with B., the bank by special power appointed their local manager agent to accept the chattel mortgage and as such agent to make the affidavits required to be made by mortgagees.

Held, (1) [reversing the judgment below] that it need not appear on the affidavit, or the mortgage, or the papers filed therewith, that the agent was aware of the circumstances connected with such mortgage.

Held, (2) [PATTERSON, J. A. dissenting] that as under the circumstances stated the chattel mortgage was satisfied *quoad* the goods, the mortgage could not properly be refiled; and notwithstanding the continued possession of the mortgagor (B.) it was not necessary for the plaintiff to file a bill of sale from the bank to himself in order to preserve his rights as against execution creditors of or *bona fide* purchasers from B. (the mortgagor.)

THIS was an appeal by the plaintiff from the judgment of the Court of Common Pleas as reported 32 C. P. 43, where, as also in the opinion delivered by Patterson, J. A., on the present appeal, the facts out of which the litigation arose are fully and clearly set forth.

Moss, Q.C., for the appellant. The judgment of the Court below, I submit, cannot be sustained, as although the Chattel Mortgage Act (R. S. O. ch. 119), requires that the agent making the affidavit of *bona fides*, called for by that Act, should be aware of all the circumstances connected with the mortgage or other conveyance, it nowhere appears that the agent should allege in his affidavit that he was aware of such circumstances; and the second section of the Act shews specifically what the affidavit should state, whether made by the mortgagee or his agent. The affidavit and power of attorney filed with the original mortgage in this case shew clearly that he was aware of all the circumstances.

But even if it should be necessary to prove that the agent was aware of the circumstances, that can be shewn by evidence *dehors* the mortgage or any papers filed with it. Here the evidence is that the agent, who was the local manager of the bank, was aware of the circumstances, and it was so stated in his affidavit filed on the renewal of the mortgage.

The mortgage was shewn to have been duly renewed, and the period of such renewal had not expired at the time of the seizure and sale by the sheriff, who acted as the bailiff of the bank; and no authority exists for asserting that the appellant was bound to register a bill of sale from the sheriff. In fact the sale by him had the same effect as if it had been made under an execution. And besides Tait, the respondent here, is not in a position to impeach the mortgage or the sale under it, not being a creditor of the vendors, the Consolidated Bank, and not being a subsequent purchaser or mortgagee in good faith.

McClive, for the respondent. By the Act in question, the agent of the mortgagee must state in his affidavit of *bona fides*, or in some portion of the mortgage, or in some paper so attached thereto as to become incorporated with it, that he is acquainted with the circumstances of the taking of the chattel mortgage: in other words, that by reason of his knowledge of the facts and circumstances, the affidavit

of the mortgagee may be dispensed with, and his accepted instead. In fact, upon reading the mortgage and the affidavits and papers filed therewith, all the facts that really give validity to the instrument must appear, and a statement of this fact cannot be omitted.

The statement made by the agent on the renewal of the mortgage was clearly not sufficient, for it may well be true and still he may not have known of the facts and circumstances under which the chattel mortgage was given.

The mortgage, as it is shewn, had expired, and no registration thereof existed when the sheriff seized under the execution of the respondent.

The title of the appellant depends entirely on the conveyance by way of mortgage from Brown, the mortgagor, to the bank; therefore, as Brown always remained in possession, as soon as the title under the mortgage ceased to be a registered title by reason of non-renewal, the property embraced therein became liable to be seized under the execution against Brown.

The appellant to preserve and retain his priority as against the respondent, an execution creditor of Brown, should at all events have kept the mortgage duly renewed, or have registered a bill of sale from the mortgagees to himself, or have taken possession of the property so purchased by him. Not having done so, it was liable to be seized under the execution, which was in force before the appellant became a purchaser, and up to the time of such seizure remained in force.

The cases relied on appear in the report of the case in 32 C. P. and in the judgment.

March 24th, 1882. BURTON, J. A.—Two questions were raised upon this appeal:

First, as to the sufficiency of the affidavit of *bona fides* required by the statute. And, secondly, as to the necessity of a change of possession or re-filing of the mortgage, where a sale had been made by the mortgagee after default to a *bona fide* purchaser, who had allowed the mortgagor to remain in possession under a lease from him.

The first objection is based on the absence of any statement in the affidavit of the agent, that he is aware of all the circumstances connected with the mortgage.

It is true that the section of the Act which authorizes an agent to make the affidavit in place of the mortgagee adds the words—"If such agent is aware of the circumstances"—which were perhaps intended to shew that the affidavit must be made by some one having the actual knowledge, and not by one swearing according to his belief or on the information of others; but it appears to me that we should be adding to the requirements of this Act of Parliament were we to hold it necessary that the agent should swear to that in addition to what the second section in terms requires.

That section provides that whether the affidavit is made by the mortgagee or his agent he shall swear to certain facts, but there is nothing in terms requiring that he should state that he is acquainted with the circumstances, and this is not surprising as without such acquaintance he could not truthfully make the affidavit.

If these words had been carried into the section which prescribes what the affidavit shall state, it would of course be no answer to an objection to an affidavit omitting them to say that they are immaterial, as the agent could not depose to these facts if he had not the knowledge of all the circumstances. The Legislature having declared that the affidavit should be in that form it would have to be strictly followed; it has not said so, but has declared that the affidavit may be made either by the mortgagee or the agent, and in each case the facts required to be sworn to are the same.

I am at a loss to see why the Courts should require more than the Legislature has thought it necessary to exact. If the agent has sworn to the truth he must have been acquainted with all the circumstances necessary to be sworn to; if he was not so acquainted, I cannot see how the purposes of the Act would be better secured by requiring him to swear that he was. It appears to me to be much

safer always to adhere to the words of an Act of Parliament, and not to speculate whether something not specially mentioned would better secure the object which the legislature may be supposed to have in view.

I notice that the learned Chief Justice of the Common Pleas in his judgment says that properly the affidavit should disclose the further fact that the agent is authorized in writing, adding, however, that that might not be necessary if the authority is verified by the oath of the attesting witness. But here again I submit with great deference that the learned Judge is going beyond the requirements of the Act, which simply renders it incumbent upon the agent to file not the authority, but a copy of it, with the mortgage, and does not require any proof of its execution.

I do not enter upon the question of whether it does or does not appear *aliunde* upon the papers that the agent had such knowledge, because it appears to me to be clear that upon the proper construction of this Act of Parliament nothing more is required than that the mortgage should be accompanied with an affidavit swearing to the facts required in the second section by the mortgagee or his agent.

The learned Chief Justice has referred to the case of *The Freehold Loan and Savings Society v. The Bank of Commerce*, 44 Q. B. 284, as an express decision against the plaintiff; and if the language of one of the Judges who decided that case is to be regarded as the decision I agree with him, and can quite understand his deeming it binding upon him as the decision of a Court of co-ordinate jurisdiction; but my brother Cameron, who sat with us on the argument of this case and was a party to that decision, informs us that that the case was decided simply on the ground that there was there in fact no authority in writing, and the remarks to which I have referred were unnecessary to the decision of the case.

The view which I take of the matter is, that if it is necessary that these facts should appear in the affidavit this mortgage is clearly invalid; but if it is not necessary

to shew them in the affidavit, then it is equally unnecessary that they should appear either in the mortgage or in the papers filed with it.

The case of *Jones v. Harris*, L. R. 7 Q. B. 157, has no application, in my opinion, to the point we are now considering.

The statute there required that the affidavit filed with a bill of sale should contain a statement of the residence of the party making the bill of sale. The residence was stated in the affidavit as Dynevor Lodge, plainly insufficient to lead the inquiries of a person not possessed of a peculiar local knowledge to what was meant by Dynevor Lodge. And that case merely decided that the bill of sale, where the locality of Dynevor Lodge was more fully given, might be looked at in order to understand the affidavit.

Then as to the second objection, it appears to me to be based on an entire misapprehension of the Chattel Mortgage Act. If the plaintiff here were a mere assignee of the mortgagees there can be no question that, in order to preserve his title, it would be necessary to re-file the mortgage with the requisite affidavits. That, however, is not his position. He is the purchaser of the actual goods, not of the mortgagees' interest in them, but of the goods themselves, which, upon default occurring, the mortgagees were empowered to sell.

I cannot understand why the mortgage should be refiled in order to preserve this claim, nor how it could be effected. *Quoad* these goods the mortgage is satisfied, and no one could take the necessary steps to refile it.

Then was it necessary to file the bill of sale from the Bank to the plaintiff? If such a form had been gone through with, what shape would it have assumed? The plaintiff would have had to make an affidavit that this sale was *bonâ fide* and not for the purpose of enabling him to hold the goods against the creditors of the bank.

The case cited from the English Reports is very distinguishable. The Act there required that even in the case of a bill of sale where the grantor remains in possession

the bill of sale should cease to have any effect after five years. The purchaser from him acquired no better title, and unless he went into possession was liable to have it defeated by a creditor at the expiration of the five years in the same way as the assignee of these mortgagees would have been liable to have his title defeated at the expiration of each year unless the mortgage were renewed.

The case of *Chamberlain v. Green*, 20 C. P. 304, is also different from the present case. The mortgagee had not there sold to a *bond fide* purchaser, but being still mortgagee without any conveyance from his mortgagor of the equity of redemption, granted a lease to him, the possession never having been changed. A creditor therefore, whose writ was lodged before the lease was executed, finding that at the expiration of the year the mortgage was not refilled seized the goods. The mortgagee had obviously no answer; there was no absolute bill of sale from the mortgagor registered with the prescribed formalities and there was no actual change of possession.

In the present case the mortgagees have sold, and the property in the goods passed from them to the plaintiff; as between them there was a valid sale liable to be defeated possibly by an execution creditor of the Bank. Upon the sale the plaintiff entered into a new arrangement with the original debtor, by which he leased them to him upon certain terms.

It is conceded that if the bill of sale had been registered the defendant's execution would not have attached, and by a parity of reasoning the same result would follow if the possession had been taken by the purchaser. It cannot be material whether that possession was for a day or a year. Having a title to the goods he would have a perfect right to lease them to Brown, and it is difficult to perceive the difference so far as the defendant is concerned, between that state of things and the one we are considering.

It is not necessary in this view to consider the decisions in the line of cases of which *Baldwin v. Benjamin*, 16 U. C. R. 52, on the one side, and *Turner v. Mills*, 11 C. P.

366, on the other, are illustrations, and which Mr. McClive considered to be conflicting, but he will, I think, find on more careful examination that the supposed conflict does not exist.

I think the plaintiff's title was not successfully impeached, and that this appeal should be allowed with costs.

SPRAGGE, C. J. O.—I agree in the opinion expressed by my brother Burton that the first ground of objection fails, and in the reasons given by him leading to that conclusion. If the sale by the bank to the plaintiff was a good sale, and it does not seem to be impeached, it would be impossible after that sale to re-register the mortgage. It would be impossible because the statement required by sec. 10 of the Act, R. S. O. ch. 119, and the affidavit required by sec. 11, could not be made.

It is a different question, whether the plaintiff, being purchaser from the bank, should not have registered the bill of sale from the bank to himself. The statute requires that every sale of goods and chattels not accompanied by an immediate delivery and followed by an actual and continued change of possession, shall be in writing; and shall be registered within the time, and in the manner required by the Act; and it then goes on to provide what shall be the consequences if this be not done, viz., that "the sale shall be absolutely void as against the creditors of the bargainor, and as against subsequent purchasers or mortgagees in good faith."

The party complaining of this sale is a judgment creditor, not however of the bargainor, but of the original mortgagor, and the statute gives him no *locus standi* in such case; and it would be strange if it did. He had no interest in the goods, other than subject to the mortgage to the bank. The sale of the goods only partially satisfied that mortgage, and the bank satisfying a portion of their debt by sale under the chattel mortgage could not reasonably let in the execution creditor any more than he could or ought to have been let in if the bank had been a

prior execution creditor, and had satisfied a portion of its debt by sale of these same chattels.

And this strange consequence might follow. An execution creditor of the bank might take in execution these same chattels. If the creditor of the mortgagor could do the same a conflict of claim would follow. The rights of the two execution creditors would be inconsistent; and without saying that the creditor of the bank would be entitled, for that point is not before us, it is sufficient to say that the statute gives no right, under the circumstances of this case, to the execution creditor of the mortgagor. My conclusion is that the execution creditor of the mortgagor has on his second ground of appeal no *locus standi* to complain of what has been done, or omitted to be done, in the case; and that the appeal should be dismissed with costs.

Since penning the foregoing I have read with care and attention the elaborate judgment of my brother Patterson in this case, but it fails to convince me of the necessity or even the practicability of re-registering the mortgage, inasmuch as it had ceased to exist. Nothing was due upon it, and no affidavit could be made shewing how much was due, as contemplated by sections 10 and 11. Then who could make such an affidavit? Carlisle could not, for no money was due to him, neither could an officer of the bank, for though money was due to the bank it was not due upon the security of the chattels comprised in the mortgage. If it be contended that the bill of sale is to be registered Carlisle was the person upon whom it was incumbent to register it, if for his own protection he deemed it necessary or advisable to do so. But then the question arises, against what classes of persons is he to be protected? or, in other words, by what classes of persons could the sale to him be impeached on the ground of non-registration? or again, in other words as against whom does the statute make the unregistered bill of sale void? The Act says: "as against the creditors of the bargainor, and as against subsequent purchasers or mortgagees in good faith." The

defendant fills none of these characters. Without the statute it would not be void at all. The defendant therefore must bring himself within the statute, or he has no *locus standi* in Court. This difficulty appears to me to be insuperable.

My brother Patterson is probably right in saying that the statute, unless construed as he construes it, leaves some mischiefs arising from property in chattels being in one hand and the possession in another unremedied; but such mischiefs are not for us to remedy. The statute varies the Common Law rights of parties. So far as it does this, expressly or by necessary implication, we must hold the Common Law varied, but no further. This is a maxim from which we are not at liberty to depart, and I think we should depart from it very decidedly, if we were to hold that the execution creditor of Brown has a right to come into Court and complain either of the mortgage to the bank not being re-registered, or of the bill of sale from the bank to Carlisle not being registered.

In *Karet v. The Kosher Meat Supply Association*, 2 Q. B. D. 361, there was a bill of sale, not a mortgage; the statute required re-registration within five years; there was an assignment within five years of the chattels comprised in the bill of sale, but there was no re-registration; and the question was whether the assignee was in the same position as to re-registration as was his assignor; and it was held that he was. In that case the affidavit required upon re-registration could be made without difficulty, and there was really no reason why the bill of sale should not be re-registered. The cases would have been parallel if in this case Carlisle had been assignee of Brown's mortgage to the bank, instead of being as he was, a purchaser from the bank of the chattels comprised in the mortgage.

I agree that in such a case the chattels remaining in the possession of Brown after the sale to Carlisle, as well as before, he, Brown, might, as pointed out by the Court in the case cited, go on obtaining credit, his creditors not

having such protection as registration would afford them ; but the difficulty is, not only that the case is not touched by the statute, but that the machinery provided by the statute is inapplicable to such a case, and machinery suitable to it would need to be provided.

I am, therefore, still of opinion that the plaintiff is entitled to our judgment.

PATTERSON, J. A.—The facts involved in this case may be stated in a few words.

One Brown made a chattel mortgage to the Consolidated Bank, dated 22nd August, 1878, to secure a debt of \$5,000, payable in one year with interest at seven per cent., covering his household furniture and a few other household articles, all of which were in or about his dwelling house at St. Catharines.

The bank gave to Mr. Nicholls, the manager of its office at St. Catharines, a formal power of attorney, dated 6th August, 1878, to act for the bank in taking the mortgage, and to make all affidavits, &c.

The mortgage was filed on the 24th August, 1878, with a regular affidavit of execution, and with an affidavit of *bona fides* made in the terms prescribed by the second section of the Act respecting mortgages and sales of personal property, R. S. O. ch. 119, by Mr. Nicholls, who was described in it as "Manager of the Consolidated Bank of Canada at St. Catharines." The power of attorney was annexed to the mortgage and filed with it.

The mortgage was duly refiled on 22nd August, 1879, with a statement showing \$5,780.12 still due upon it.

On 22nd September, 1879, a document was executed by the bank appointing Mr. Woodruff bailiff for the purpose of seizing and taking possession of the goods and chattels mentioned in the mortgage, and requiring him to proceed forthwith to a sale of the goods and chattels according to the terms of the mortgage.

Under this authority Mr. Woodruff, after having had the property valued, sold it to the plaintiff on 12th April,

1880, for \$900 by private sale, and made a bill of sale of it, which sale is expressed in that instrument as being made under the warrant of 22nd September, 1879. The plaintiff then rented the goods and chattels to Brown, who remained in possession of them as he had always been.

The learned Judge at the trial found that the plaintiff purchased the goods in good faith: that he never took possession of them, but allowed them to remain in the possession of Brown.

The plaintiff himself said, in his evidence at the trial, "At the time I bought these goods Brown was indebted to me about \$1,000. I think one object I had in buying these goods was that I thought there was ample security for the money required by the bank, and also additional security for his indebtedness to me at that time; the goods seemed to be worth about \$5,000. I never had any understanding that he could have them when he paid me and the bank. If he paid me and what I paid the bank, I think I would have let him have the goods back. * * * When I said I thought I would have reconveyed if I got the \$900, I did not say there was a bargain that I should do so. There was no such bargain."

The defendant had had an execution against Brown in the hands of the sheriff from 28th September, 1878. Under this execution the sheriff, who happened to be the same Mr. Woodruff who had acted as bailiff for the bank, seized the goods. Hence this interpleader.

The case for the defendant is put upon two grounds: 1st. That the chattel mortgage was always void as against him, because in the first affidavit of *bona fides* Mr. Nicholl did not state that he was aware of all the circumstances connected with the mortgage. 2ndly. Because, although Brown remained in possession of the goods after 22nd of August, 1880, when the year from the refile of the mortgage expired, it was not again refiled, nor was any instrument filed under the provisions of the statute.

The issue is whether the goods were, at the time of

their seizure by the sheriff, the property of the plaintiff as against the defendant.

I do not find any statement of when the seizure took place, but I assume it was after 22nd August, 1880.

Upon the first point I agree with my learned brothers who hold that the statute was complied with. It is true that the statute requires that when the affidavit is not made by the mortgagee (who may make it whether he has or has not any personal knowledge of the transaction, so far as the expressed requirements are concerned) it must be made by an agent possessed of two qualifications, viz., a proper authority in writing to take the mortgage, and a knowledge of all the circumstances connected therewith. But while it requires the authority to be filed, it does not require it to be verified by oath, although it does require the execution of the mortgage to be proved by the affidavit of a witness thereto; nor does it require the fact of the agent's acquaintance with the circumstances to be shewn by affidavit or otherwise. I do not attempt to speculate upon what would be the effect upon the validity of a mortgage in case the agent who made the affidavit was shewn to have no knowledge whatever of the transaction, and yet the transaction itself should be proved to be *bona fide* and exactly as stated in the affidavit; and I do not try to form an opinion as to the extent or character of the knowledge which the agent ought to have. Such questions may possibly arise and be found somewhat troublesome. I think it is enough for the present purpose to decide that the statute which gives express directions as to what the affidavit, whether made by the mortgagee or his agent, shall contain, has no direction to include what is now complained of as wanting. I say nothing of the policy of requiring such a statement to be contained. No doubt plausible reasons may be given for saying it would be better to have it there; and there is as little room to doubt that other enactments of this statute might be varied or supplemented without detriment to its intelligibility or adaptation to the actual conduct of the business affected

by it. Such changes are however for the legislature to make if they are deemed desirable. This affidavit, which complies with all that is set down in terms, must in my opinion be held to be sufficient.

The other objection is less technical in its character, and raises the question of the sufficiency of the statute to accomplish the direct purpose for which it was enacted.

The policy of the statute I understand to be to discourage secret conveyances of goods and chattels, by treating a person who remains in actual possession of goods which once were his, as being, with relation to creditors and purchasers in good faith, the true owner, unless there is a registered document shewing that the title is different from that which the possession would imply. See recital in the English Bills of Sale Act, 1854.

Before the law was enacted, the Courts were often occupied with litigation at the instance of creditors, concerning the ownership of goods seized in the possession of their debtor, but to which some third party asserted title derived from the debtor. The continued possession was always evidence of want of *bona fides* in the alleged sale or conveyance, but it was a circumstance that could be explained away, if a satisfactory explanation were forthcoming.

Our first statute on the subject was 12 Vic. ch. 74, passed in 1849. It was copied from the statute of the State of New York, of 1833, ch. 279, and enacted that every mortgage or conveyance intended to operate as a mortgage of goods and chattels, which should not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things mortgaged, should be absolutely void as against the creditors of the mortgagor and as against subsequent purchasers and mortgagees in good faith, unless the mortgage or conveyance, or a true copy thereof, together with an affidavit of execution, should be filed as directed by the Act. The third section declared that every mortgage or copy filed in pursuance of the Act should cease to be valid as against

the creditors of the person making the same or against subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing thereof, unless within thirty days next preceding the expiration of the said term of one year, a true copy of such mortgage, together with a statement exhibiting the interest of the mortgagee in the property thereby claimed by virtue thereof, should be again filed. The other provisions of the statute related to the place of filing and some other matters not material to be noticed at present, in all of which the New York Statute was taken as a model.

In the following year the legislation gave further expression to the policy indicated by the Act, by passing the statute 13 & 14 Vict. ch. 62, which amended the Act of 1849, by declaring that every sale of goods and chattels, which should not be accompanied by an immediate delivery and followed by an actual and continued change of possession of the goods sold, should be in writing, and such writing should be a conveyance under the provisions of the former Act. It also added to the requirements of the original Act, by making it necessary that the mortgages and conveyances filed should be accompanied with an affidavit of *bona fides*. Thus the law remained until 1857, when, by 20 Vict. ch. 3, the two earlier Acts were repealed and the law recast in the shape in which we have it at present.

Under the present law all the essentials of the Acts of 1849 and 1850 remain unchanged, except that an absolute bill of sale does not require to be refiled. The changes made have been principally by the addition of new provisions which do not come in question at present.

The policy of the law has undergone no alteration; the added provisions rather emphasizing it, their tendency being towards the more full exhibition on the face of the recorded instrument of the exact dealings in respect of the property.

In the case before us, the goods, which had been the property of the judgment debtor and in his actual possession,

remained in his actual possession, precisely as they had always been, until seized under the execution.

If the statute fails to reach this state of things because something has taken place between the mortgagee and a stranger, and something more between the stranger and the mortgagor, while the creditor sees no change, and no change in fact takes place in the possession or apparent ownership of the goods, it must have fallen short of accomplishing its purpose. It must have been so unskillfully framed as not only to permit but to invite evasion of its object and design.

We have to see how this is. In attempting this task it would doubtless greatly aid us to have the assistance of the decisions of other courts, either English or American upon similar statutory provisions. It happens, however, that neither in England nor in the United States are the laws upon the subject exactly like ours. Yet we are not quite without English authority, for the case of *Karet v. Kosher Meat Supply Association*, L. R. 2 Q. B. D. 361, which is referred to by the learned Chief Justice in the Court below, deals with a question involving the same principles, though arising upon a statute not precisely like that which we have to construe.

The Acts in force in those States of the American union which have legislated upon the subject are, as we are told by Mr. Herman in his treatise on Chattel Mortgages, for the most part founded on the statutes of New York and Ohio. I have not had an opportunity of seeing the Ohio statute—that of New York, as we have seen, deals with mortgages only, and not with absolute bills of sale. From what I gather from the Revised Statute of New York respecting Fraudulent conveyances and contracts relative to goods, chattels and things in action, printed in Denio and Tracey's collection, 1852, I understand that in New York the common law is varied, if it is a variation, only by attaching to the retention of possession by the vendor or mortgagor of goods a presumption of fraud as against creditors and purchasers in good faith, which can only be

rebutted by proof that the sale or conveyance was made in good faith and without intent to defraud such creditors or purchasers, and by requiring in case of mortgages that they shall be duly filed and refiled.

It thus appears that the policy of our law, which aims at exhibiting a record of the real state of the title in every case, whether of sale or mortgage, when actual possession does not accompany the change of ownership, is in advance of that adopted by our neighbours.

From this cause we have not the advantage of the discussion in the American Courts from the same standpoint from which we must regard them, of questions which might otherwise seem common to both systems.

This remark applies to such cases as *Otis v. Stitt*, 8 Barb. 102, and *Parker v. Parmly*, 3 N. Y. S. C. 398, in both of which the refileing of a mortgage was held to have become unnecessary by reason of acts of the mortgagee which, in my judgment, could not, under our statute, be held to have that effect.

The case of *Karet v. Kosher Meat Supply Association*, arose under the Bill of Sale Act, 1854, 17 & 18 Vict. ch. 36, and an amendment made in 1866, by 29 & 30 Vict. ch. 96. The principal Act required the bill of sale to be filed within twenty-one days after it was made or given, and the amending Act declared that "the registration of a bill of sale under the principal Act shall, during the subsistence of such security, be renewed in manner hereinafter mentioned once in every period of five years;" the penalty for failing to register or to renew being the nullity of the bill of sale, as against assignees in bankruptcy, &c., &c. The bill of sale was to be renewed "by some person filing in, &c., an affidavit stating the date of such bill of sale, and names residences and occupations of the respective parties thereto as stated therein, and also the date of the registration of such bill of sale, and that such bill of sale is still a subsisting security." The bill of sale in question in that case had been duly registered, but the registration was not renewed at the end of five years.

Within the five years the grantee, by indenture, for valuable consideration, assigned to the plaintiff all the goods and all his estate and interest therein or thereto. After the expiration of the five years, the goods still remaining in the actual and apparent possession of the grantor, they were seized under an execution against him. It was held that the goods were liable to the execution.

In giving judgment, Mellor, J. remarked that there was nothing to take the case out of the statute, except the fact that the grantee had executed an assignment of his interest, and that the Act did not in terms require the assignee to register. But he could not think that that was of the slightest consequence. To adopt the plaintiff's construction would be to entirely get rid of the provisions of the statute, for when, as in that case, the grantee had made an assignment, the grantor would go on obtaining credit, and his creditors would have no protection. Field, J., made remarks to the same effect, saying amongst other things: "But it is argued that inasmuch as the grantee of the bill of sale has *bona fide* conveyed his interest to a third person, the defect in the registration is immaterial. As a general proposition, any one acquiring the possession of goods cannot have a better title than the person who grants to him. Is the present case an exception? I think to hold that it is would go far towards repealing the Act of Parliament." All this is very much to the point in the present case. The principle and object of the English Act as set forth in its preamble, and of our Act as apparent from all its provisions, are identical. There are, no doubt, many points in which their provisions differ; but those differences serve to indicate the anxiety of our Legislature, by, wisely or unwisely, prescribing, with some minuteness of detail, the procedure to be followed, to secure ample information for those who inspect the registered documents. The main contention for the defendant is that the shape assumed by the transaction in question excludes it, by reason of that very minuteness of detail, from the operation of the statute.

In my opinion that contention cannot be maintained.

The tenth section of the statute (R. S. O. ch. 119) enacts that every mortgage, or copy thereof, filed in pursuance of this Act, shall cease to be valid as against the creditors, &c., after the expiration of one year from the filing thereof, unless, within thirty days next preceding the expiration of the said term of one year, a true copy of the mortgage, together with a statement exhibiting the interest of the mortgagee in the property claimed by virtue thereof, and a full statement of the amount still due for the principal and interest thereon, and of all payments made on account thereof, is again filed in, &c., with an affidavit of the mortgagee, or of one of several mortgagees, or of the assignee, or one of several assignees, or of the agent of the mortgagee, or assignee, or mortgagees, or assignees, as the case may be, duly authorized in writing for that purpose (which authority shall be filed therewith), stating that such statements are true, and that the said mortgage has not been kept on foot for any fraudulent purpose.

The reference to the assignee was an amendment introduced by 40 Vict. ch. 7, Sch. A. (135). It must be confessed that the new work might have been more accurately fitted into the old. Reading it literally as it now stands, the statement is to exhibit the interest of the *mortgagee* in the property, and the *assignee* is to swear to it. Can we read *mortgagee*, where it is thus used, as including *assignee*? There would not, I apprehend, be any difficulty in treating the assignee of a mortgage as the mortgagee, for the purpose of such an enactment as this, were it not that we have both terms used in the added portion of the clause, and upon ordinary principles of interpretation we ought not to read them as denoting the same person.

We have, however, to give to the clause as a whole "such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act, and of such provision or enactment, according to their true intent, meaning and spirit:" R. S. O. ch. sec. 8, sub-sec. 38.

We cannot doubt that even without the express sanction of the Interpretation Act for reading words importing the

singular number as including more persons than one, it would have been proper to understand the clause which requires the interest of the *mortgagee* to be exhibited as applying to all the mortgagees when more than one; and we may without impropriety take the subsequent reference to *mortgagees*, or one of *several mortgagees*—for which we are indebted to the same amendment—as rather recognizing the force of the previous word *mortgagee* as embracing all those in whom the property was vested under the mortgage, than as tending to limit the significance which attached to the word in the original Act.

We should require more direct evidence of the intention to vary the scope of the original provision, while re-enacting it in the original terms, than any implication to be drawn from the introduction into the same clause of an amendment in which the attempt was made to be more specific in the phraseology employed. The principle to guide us is akin to that enunciated by Sir James Colville, in giving the judgment of the judicial committee in *Brown v. McLachlan*, L. R. 4 P. C. 550: "Their Lordships conceive," he said, "that in dealing with a statute which professes merely to repeal a former statute of limited operation, and to re-enact its provisions in an amended form, they are not necessarily to presume an intention to extend the operation of those provisions to classes of persons not previously subject to them unless the contrary is shewn; but that they are to determine on a fair construction of the whole statute considered with reference to the surrounding circumstances whether such an intention existed."

The same reasoning which extends the word *mortgagee* to include several mortgagees will apply to the assignee, and, in my opinion, justify and require the reading of the clause as calling for the filing of a statement exhibiting the interest in the property claimed by virtue of the mortgage, by any person who claims title under the mortgage to the property, whether the original mortgagee or his assignee.

We must not lose sight of the leading purpose of the

statute, which is to shew the ownership of goods which are in the possession of one who has ceased to be the owner. It is upon the goods themselves and the effect of the dealings upon the title to the goods that attention has always to be fixed. The state of accounts between mortgagor and mortgagee is only important so far as it affects the ownership of the goods.

Having regard to this consideration, amongst others, I do not appreciate the supposed difficulty in the way of the purchaser of mortgaged goods from the mortgagee, if he chooses to allow the mortgagor to retain possession of them, complying with all the requirements of section ten.

He is the assignee of the goods, and he holds under the title conveyed by the mortgage. The defendant is spoken of as having bought under the power of sale contained in mortgage. It does not strike me as material whether the mortgagee sold under the power of sale, or sold by virtue of his absolute title, as he might have done if there had been no formal power of sale.

If the sale was simply under the power, then I apprehend the purchaser bought in legal effect from the mortgagor, and came under the provision of the statute concerning absolute sales.

If the mortgagee, having title under the mortgage in himself, sold that title, he could give only the title he had, that is to say that which he acquired and held under an instrument which became void, as to property retained in the possession of the grantor, unless refiled every year.

It may be worth noticing, although not perhaps of much moment, that the enactment we are considering does not contain the expression assignee *of the mortgage*; it speaks generally of "the assignee;" and therefore the language itself creates no difficulty in treating the reference as being to the assignee of that which is the subject of the legislation, namely the goods; although I do not think the phrase "assignee of the mortgage," if used in connection with these provisions, would have had any narrower meaning.

It is scarcely necessary to say that I do not lose sight of the canon applied to the construction of statutes which restrict the common law rights of individuals. The language of Draper, C. J., in *Kraemer v. Gless*, 10 C. P. 475, is often quoted as containing a statement of that rule, and I do not know that it can be found anywhere more correctly and more concisely expressed. His words were : "It is against principle and authority to infringe any further than is necessary for obtaining the full measure of relief or benefit the Act was intended to give." This dictum is occasionally cited as if it inculcated a strict construction of the language of the statute such as would be applied to a penal law, and as if it laid down, as applicable to a class of statutes so large as to include the great bulk of public legislation, a rule different from that which I have already quoted from the Interpretation Act as governing all statutes. If the two rules are in conflict, that of the Interpretation Act must of course prevail. There is, however no conflict between them. I strive to apply to the statute before us the test proposed in *Kraemer v. Gless*, to be applied to the statute which dealt with the property of married women. The object of the Bills of Sale Act being the security of persons who deal with others in reliance on their apparent ownership of the chattels in their possession, the benefit intended by the Act being protection against secret conveyances inconsistent with the ostensible ownership, it is in accordance at once with the principle asserted in the case, and with that made law by the Interpretation Act, so to interpret the statute that to the extent to which a fair rendering of its language will warrant, the full measure of the benefit it was intended to give may be obtained.

I do not read the requirement of refiling as being restricted to mortgages which are still redeemable. The property may have become absolute in the mortgagee ; but, unless I greatly misapprehend the effect of the statute, that circumstance will not excuse him from refiling his mortgage. So to hold would make the statute of little use, and

provide an easy way of evading the provision for the registration of absolute bills of sale.

It is true there is room for an argument afforded by an addition made by the Act of 1857 to the requirements of that of 1849. The earlier Act required the statement to exhibit the interest of the mortgagee in the property; the added requisite was a full statement of the amount still due for principal and interest upon the mortgage, and of all payments made on account thereof. This aimed at providing the creditor or intending purchaser with all particulars of the state of the incumbrance up to the date of the statement; but it put no obstacle in the way of the mortgagee declaring the truth. The legal relation between the parties to the instrument was not altered by the statute. If, apart from the statute, the property became absolutely vested in the mortgagee without further right of redemption, the statute would not make it redeemable. Yet, as I read the statute, the mortgage must be refiled. In such a case a statement shewing that the whole or part of the mortgage money had never been paid, and that the right to redeem had ceased, whether by the terms of the deed or otherwise, as *e. g.*, by foreclosure,* or by the *bona fide* sale and repurchase of the goods, and so the interest of the mortgagee was the absolute ownership of the goods, would satisfy the terms of the section.

The object might probably, had the statute allowed it, be achieved in a more direct fashion; and after once filing a statement shewing an absolute interest in the mortgagee any further refileing might well be dispensed with, following the rule of the same statute concerning absolute sales. But, in the absence of statutory sanction for this, the periodical refileing would still be requisite, as it is under the English Acts in case of all bills of sale, whether absolute or conditional.

* NOTE.—As to foreclosure of chattels see *Kemp v. Westbrook*, 1 Ves. Sen. 278; *Slade v. Rigg*, 3 Ha. 35; *Wayne v. Hankham*, 9 Ha. 42; *Cook v. Flood*, 5 Gr. 463; *Carter v. Wake*, L. R. 4 Chy. D. 605; *Seton on Decrees*, 1094, 1095.

It is only faintly, if at all, contended that a mortgagee may himself claim as against a creditor of his mortgagor, without having duly refiled his mortgage, the property which he has allowed to remain in the mortgagor's possession, even though his title to the property may, at law and in equity, have become absolute. The contention is that he can confer on his vendee a right which he could not himself assert.

I cannot assent to this proposition. I take the vendee to be the assignee within the intent and meaning of section ten. As I have attempted to point out, the assignee, for the purpose of the statute, is the assignee of the goods which are the subject of the legislation. He is included in the term mortgagee, as I interpret that word in the earlier part of the clause. It is no more essential as to him, than as to the mortgagee proper, that his interest in the property should be a redeemable interest. What is required is a true statement of what the interest is; and there is no reason apparent to me why he should not make and file such a statement. His only title is derived under the deed which the statute declares shall not, while the possession of the goods remains unchanged, be in any respect a secret, but which shall be deemed not to exist, or to have ceased to be operative, unless kept on record in the mode prescribed.

Upon these points *Karet v. Kosher Meat Supply Association* is a useful authority, as it proceeds upon principles which are very apposite to the case before us. The bill of sale in question in that case was, according to the case stated, an absolute bill of sale. The statute required every bill of sale to be periodically refiled "during the subsistence of the security," a phrase quite as suggestive of a redeemable charge as anything found in sec. 10; and it required the affidavit to state that the bill of sale was still a subsisting security. The duty to renew the registration was not in terms cast upon the assignee. Yet, interpreting the statute in the light of its guiding principle and object, the assignment of the goods was held not to dispense with the duty.

In my opinion the duty is cast upon the assignee ; under the circumstances before us, by our statute at least as clearly ; I think, even more so.

For these reasons I think the decision of the Court below is correct, and that the appeal should be dismissed with costs.

CAMERON, J.—From the evidence it appears the chattel mortgage, the validity of which was questioned in the Court of Common Pleas, was taken through an agent duly authorized by the mortgagees. His authority in writing was duly filed with the mortgage and affidavits of execution and *bona fides*. The affidavit of *bona fides* contained all the statements or allegations that would have been required if the affidavit had been made by the mortgagees ; but it did not appear by affidavit or other paper or writing filed with the mortgage on the first filing thereof, that the agent taking the mortgage and making the affidavit was aware of all the circumstances connected therewith.

It is objected that the want of such affidavit or statement rendered the mortgage invalid against the respondent, an execution creditor of the mortgagor. In my opinion this objection is not entitled to prevail. The affidavit filed contains all that the Act in express terms requires, and a Court is not at liberty to assume, because the agent has not sworn that he knew all the circumstances connected with the mortgage, that he did not know them and therefore the requirement of the statute in this respect has not been complied with.

The object of the Act is served by the filing of the mortgage, the affidavit of execution, and the affidavit of *bona fides* made by an agent duly authorized in writing. That is notice to creditors and the public generally that the goods of the debtor are burdened with the incumbrance created by the mortgage ; and the want of a declaration under oath or otherwise of the agent's knowledge of the circumstances, cannot in any manner detract from the efficacy of such notice. The affidavit that was made could

not have been properly made if the agent had not been aware of the circumstances. The objection then is technical, and if not within the requirement of the Act as expressed, the Act should not be enlarged to render invalid that which would have been valid at Common Law.

I am by no means satisfied that any statement in an affidavit of this kind, not coming within the express requirement of the statute, should not be considered extra judicial and improper. But however this may be it would be quite open to any creditor to shew that the agent who took the mortgage did not know the circumstances connected therewith, whether he asserted in the affidavit that he did know or not. That is a question of fact, and if the agent did not know the circumstances, then the mortgage would be invalid because it was not filed with an affidavit of an agent who did know them.

I think the affidavit of the agent must be taken *prima facie* to indicate that he was aware of the circumstances, and unless the fact is disproved the mortgage must be taken to be valid against this objection. The Act is not very clearly worded. It may be the Legislature intended the authority in writing *per se* to be the only and so indisputable evidence of the agent's knowledge of the circumstances, upon the supposition that only an agent knowing the circumstances would be authorized to act for the mortgagee. Of course that would not necessarily be so.

It is difficult to conceive that the Legislature, when requiring the authority to be filed and indicating expressly the statements the affidavit of *bona fides* should contain, should have made no provision for the way in which the agent's knowledge of the circumstances should be shewn unless it was deemed to be covered by the mere written authority itself to take the mortgage. The words of the statute are: "Every mortgage, or conveyance intended to operate as a mortgage of goods and chattels, made in Ontario, which is not accompanied by an immediate delivery and an actual and continued change of possession of the things mortgaged, or a true copy thereof, shall within five days

from the execution thereof be registered as hereinafter provided, together with the affidavit of a witness thereto of the due execution of such mortgage or conveyance, or of the due execution of the mortgage or conveyance of which the copy filed purports to be a copy, and also with the affidavit of the mortgagee, or of one of several mortgagees, or of the agent of the mortgagee or mortgagees, if such agent is aware of all the circumstances connected therewith, and is properly authorized in writing to take such mortgage (*in which case a copy of such authority shall be registered therewith.*") Do the words, "in which case" refer merely to the authority in writing, or do they include the other qualification of the agent—knowledge of the circumstances—and require such knowledge to be shewn in the written authority or otherwise affirmatively on behalf of the mortgagee?

I should, if it were not for the omission from the Act of all provision for making proof of the agent's knowledge, be inclined to hold the knowledge by the agent of the circumstances as well as his authority should have appeared on the face of the mortgage, or in his authority in writing. But there being no provision for proof of the agent's knowledge, while there is the positive requirement of the first section of the Act, that a copy of the authority should be registered with the mortgage, and section 4, the invalidating clause, which is as follows: "In case such mortgage or conveyance and affidavits are not registered as hereinbefore provided, the mortgage or conveyance shall be absolutely null and void," making no reference to the authority of the agent or his knowledge, it would seem all that the Legislature intended should be registered relating to the agent is an authority in writing. Unless an authority in writing had been filed as required by section 1, there would be no affidavit of *bona fides* by a person authorized to make it. The omission to register the authority would be brought within the operation of section 4, and make void the mortgage.

If this view is not correct a mortgage would not be void

under that section if there was an affidavit of *bona fides* by an agent of the mortgagee not authorized in writing filed with the mortgage and affidavit of due execution. Had section 4 been omitted from the Act, a mortgage valid at Common Law and not fraudulent would not be invalidated by the Act. What would make it invalid would be omission to comply with some one or more of the requirements of the Act specially referred to in section 4.

In the *Freshold Loan and Savings Co. v. The Bank of Commerce*, 44 U. C. R. 284, the omission to file the authority in writing of an agent taking a mortgage invalidated the mortgage. I concurred in that judgment, and have not heard anything since to induce me to think it was wrong, on the ground I have already stated; there was no affidavit of *bona fides* made by a person authorized as the statute requires, and so in effect the mortgage was registered without such affidavit.

This case, however, has been cited as an authority for the contention now urged, that the affidavit here does not shew the agent was aware of the circumstances connected with the mortgage, and therefore the mortgage is void.

It is true that the learned Chief Justice in delivering the judgment of the Court said: "Nothing is said in this affidavit as to the deponent's knowledge of the circumstances," but that fact is not made part of the *ratio decidendi*, which was the absence of the existence and filing of the written authority to the agent to take the mortgage.

The respondent relies in support of the judgment of the Court of Common Pleas upon the further objection, that the mortgage though refiled once was not refiled a second time, or at the end of the second year after it was first filed; and by reason of that omission became void, the sale of the goods to the defendant by the mortgagee, though made after default and before the time for such refiled had expired, passed no title to the goods against the respondent as an execution creditor. This contention would undoubtedly be entitled to prevail if the defendant is to be regarded as an assignee of the mortgage. But he

is not this in any sense. He is an assignee of the mortgagee, but not of the mortgage, and he could not make the affidavit and statements required by section 10 of the Act, for that section expressly supposes the continuation of the mortgage, and requires the assignee to swear that the statements of the amount due, interest of the mortgagee in the property, &c., are true, and that the mortgage has not been kept on foot for any fraudulent purpose. Assume that the sale of the goods realized sufficient to pay off the mortgage debt, how would it be possible to swear that anything was due on the mortgage, or that the mortgagee had any interest in the goods or property mortgaged?

It is quite clear that under the circumstances the requirements of the tenth section could not have been complied with. Then the question presents itself, did the fact that the appellant, the assignee of, or purchaser of the goods from, the mortgagee, allowed the goods to remain in the possession of the mortgagor under a letting thereof to him at a rent, make the goods liable to be taken in satisfaction of an execution against the mortgagor? To answer the question involves the inquiry, whose goods were the goods at time the appellant bought. They were in law the goods of the mortgagee, and when he sold them the mortgagor ceased even to have an equitable interest in the goods. When the purchaser leased them to the mortgagor it was exactly the same as if he had let him have new goods that had never belonged to the mortgagor, and he was not bound to go through the form of removing the goods and afterwards returning them on the bargain that was proved. The Act does not make the sale of goods under a valid mortgage invalid by not refiling the mortgage—it makes the mortgage invalid; but the mortgage had ceased to be an incumbrance upon the goods when it was so rendered invalid; the mortgagee could not make any claim to the goods under it.

It is said a transaction of the kind would frustrate the Act, and the learned Chief Justice of the Common Pleas said: "A debtor could make a mortgage for a month to

his creditor with a power of sale. The creditor would duly register. The creditor could on default sell to some third person, who could leave the debtor in possession of the goods forever and the public have no notice of the nature of his possession or title. It is true purchasers under execution need not register, but that is on grounds of policy which are in no way applicable to dealings between private persons."

There is no doubt a sale under execution is deemed so public an act as to be notice to the world, but in fact it is less efficacious in preventing a debtor, who has received the goods back from the purchaser at sheriff's sale either by way of loan or on hire, than a sale under a registered mortgage, from obtaining credit or dealing with goods as his own of which he is in possession.

It is not difficult to suppose a sale of a debtor's goods under execution several years back where the purchaser has hired them to the debtor who remains in possession. The debtor tries to borrow money on security of the goods or to get credit, the lender or intending creditor goes to the sheriff's office to see if there is any execution against the debtor and is told truly there is none, because there is none in fact, and he goes away satisfied that the goods are not incumbered by execution at all events. He would not think of searching back for several years to see if there ever had been an execution and what had become of it, and if he did he would simply find that it had been satisfied by the sale of the debtor's goods, and would know nothing as to whether the goods in the debtor's possession were the same or different goods without making inquiry outside of the sheriff's office. Whereas, in the case of a chattel mortgage registered, he would by a proper search discover the existence of all the bills of sale and mortgages the debtor had given, and knowing that on default the goods could be sold, he would be put on his guard and if prudent make inquiry, and without difficulty could ascertain whether the goods had been sold or not.

The Act was not intended to prevent honest transactions,

but merely to provide certain safeguards to prevent fraudulent and secret dealing with goods and chattels to the prejudice of creditors and mortgagees or purchasers for value. If the requirements of the Act according to its letter have been observed and there is no fraud, a mortgage should be upheld rather than declared void. The fact of the goods mortgaged or sold being allowed to remain in the debtor's possession, has always been a circumstance to be considered in determining the question of fraud or no fraud, but apart from the Act it could have no other effect.

The case of *Karet v. Kosher Meat Supply Association*, L. R. 2 Q. B. D. 361, is said to govern this case, and shew the omission to refile the mortgage with the statements required by the 10th section of our Bill of Sales' Act renders the mortgage void, and at first sight that case would seem to be an authority for the contention. But on examination it is quite distinguishable.

The Imperial Act, 29 & 30 Vict. ch. 96, sections 4 and 5, is very different from ours. There the bill of sale may be either absolute and pass the title in the goods and chattels or be a security, and it provides the bill of sale shall be registered every five years or be void, and such registration may be effected by anyone.

The provision in section 5 is as follows: "The registration of a bill of sale shall be renewed by *some person* filing in the office of the Masters of the Court of Queen's Bench, (being the officers acting as clerk of the docquets and judgments in the said Court,) an affidavit stating the date of such bill of sale, and the names, residences and occupation of the respective parties thereto as stated therein, and also the date of the registration of such bill of sale, and that such bill of sale is still a subsisting security, and such Master shall thereupon number such affidavit and re-number the original bill of sale or copy filed in the said office with a similar number."

The term "subsisting security," used in this clause is inapt to describe an absolute bill of sale, and would seem to

be more applicable where the bill of sale is by way of mortgage, unless security as here used means evidence of title ; at all events it must in effect mean the right to the goods is the same as at the time of the execution of the bill of sale, that is, they belong to the vendee, or to his assigns if he has parted with his interest. There is nothing required to be sworn to by the assignee or person renewing the registration that any one cognizant of the facts might not make the affidavit, while under our Act it would be impossible for the vendee of the mortgagee to make the affidavit required by section 10.

Under the Imperial Act, title, while the goods remain in the vendor's possession, can only be established to the goods by a registration kept continually renewed, and the owner of the goods cannot be heard to say as against an execution creditor that they are not the debtor's if he permits his title, so to speak, to lapse by failing to renew the registration.

I do not, as it may be argued, think that a sale by a mortgagee can be treated for the purposes of the Act as a sale by the mortgagor, whether the sale takes place under a power of sale in the mortgage or by the right of absolute ownership the mortgagee acquires upon the default of the mortgagor to comply with the requirements of the mortgage.

The learned Judge at the trial found the sale by the bank to the plaintiff of the goods was *bonâ fide*, and upon the evidence there is nothing to shew this finding was wrong.

I think, therefore, the appeal should be allowed, with costs, and the rule *nisi* in the Court of Common Pleas discharged.

LEAMING V. WOON.

Garnishing equitable claim—Receiver—Judicature Act, (O.) Rule 570.

G. was entitled under the will of C. to a life estate in land, and to the proceeds of personalty to be paid to her by the executors. Judgment creditors of G. had had a *fi. fa.*, goods returned *nulla bona*, but had not sued out a *fi. fa.* lands, when a receiver was appointed to the estate of C., whereupon the judgment creditors by petition, before the passing of the Ontario Judicature Act, applied for an order that the receiver might be directed to pay their judgment out of G's. money in his hands; or that they might attach and sell G's. life estate; or that the tenants of the realty might be directed to attorn to the petitioners and that they might be put in receipt of the rents and profits.

Held, [on appeal from Proudfoot, V. C.] that such petition had been properly dismissed, for the creditors were not in a position when they presented it either to garnish the personal estate, if that could have been done under the A. J. Act, 1873, or to seize the real estate under execution; and they had therefore no rights which the appointment of a receiver interfered with.

But, *Held*, following *Re Cowans' Estate*, L. R. 14 Ch. D. 638, that the petitioners might now garnish the moneys in the hands of the receiver; and it being alleged that a *fi. fa.* lands had since issued, the Court upon payment of costs granted leave to the petitioners, under the prayer for general relief, to sue out such writs as they might be advised.

This was a suit to protect the estate of John Cade deceased, and on the 8th October, 1879, a decree on further directions was made by Blake, V. C., whereby the defendant Robert Woon was appointed receiver of the estate of the testator, and to whom the tenants of the realty were to attorn and pay their rents. And the defendants, Mary Gurley, (who had been the widow of the testator,) William McGill, and George Henry, were ordered to transfer and deliver to the receiver all property and moneys in their hands belonging to the estate.

Subsequently thereto the Canadian Bank of Commerce presented a petition to the Court of Chancery, setting forth as follows:

"1. Under and by virtue of the last will and testament of John Cade, late of the village of Oshawa, in the county of Ontario, Esquire, the above named defendant Mary Cade (now Mary Gurley), became entitled for and during her natural life to all the real and personal property of the said testator John Cade, and it was by the said will directed and provided that the annual profits and income of the estate of the said testator should be at her disposal and for her use and benefit as long as she might live. 2. The real estate of the said testator consisted, at the time of his death, of five acres of land in the second concession of the township of

East Whitby, in the county of Ontario, and a dwelling house and premises in the village of Oshawa, and the personal estate consisted of money and mortgage securities to an amount exceeding \$20,000. 3. In the year 1873, one Joseph Leaming, who was entitled under the said will to share in the reversion of the said estate after the death of the said Mary Gurley, filed a bill in this honourable Court, wherein the said Mary Gurley and others were made defendants, and such proceedings were thereupon had and taken that on the eighth day of October last a decree was issued in the said cause, appointing Robert Woon, one of the executors named in the said will, as receiver of the said estate, and he was thereby authorized to receive and get in the rents and profits of the said real estate, and to collect and get in the outstanding personal estate of the said testator, and the tenants of the said real estate were directed to and they did attorn to the said receiver; and the defendants in the said suit were directed to, and they accordingly did transfer and deliver to the said receiver all the personal estate of the testator; and the said receiver was thereby directed to deal with and apply the said rents and profits and personal estate during the lifetime of the said Mary Gurley, according to the directions of the said will. 4. The annual income from the said real and personal estate amounts to about the sum of \$2,000, and the said receiver has from the date of his appointment as aforesaid received and collected the same, and has paid the same to the said Mary Gurley. 5. On or about the eighteenth day of March last your petitioners recovered a judgment at law against the said Mary Gurley for the sum of \$508.60 and costs, amounting to the sum of \$750.82 in all; and on the nineteenth day of March last caused a writ of *feri facias* to be issued thereon, and placed the same in the hands of the proper sheriff in that behalf. 6. On the sixth day of May last the said sheriff returned the said writ *nulla bona*. 7. Your petitioners submit that the said sheriff is prevented by the appointment of the said receiver from realizing out of the life estate of the said Mary Gurley the said judgment or any portion thereof.

"Your petitioners therefore pray: 1. That the said receiver may be directed by this honourable Court to pay your petitioners the amount of the said judgment and costs out of the moneys coming into his hands belonging to the said Mary Gurley. 2. Or that your petitioners may be at liberty to attach the life estate of the said Mary Gurley in the said real and personal estate, and to sell so much thereof as may be sufficient to satisfy the said judgment and costs. 3. Or that the tenants of the said real estate may be directed to attorn to your petitioners, and that your petitioners may be put into possession of the rents and profits thereof, and that the said receiver may be ordered for the purposes aforesaid to give up possession of the said estate. 4. And that for the purposes aforesaid all proper directions may be given and accounts taken. 5. And that your petitioners may have such further and other relief in the premises as to your lordships may seem just. 6. And that your petitioners may be paid their costs of this petition."

The testator, by the second clause of his will, gave and bequeathed to his "dear wife, for and during her natural

life, all my real and personal property of every nature and kind whatsoever, it being my will and pleasure that the annual profits or income of my said estate shall be at her disposal and for her use and benefit so long as she may live."

Affidavits were filed verifying the statements of the petition, and on the 2nd of June, 1880, the same came on to be heard before Proudfoot, V. C., who, at the conclusion of the argument, dismissed the petition with costs, to be paid by the bank to the defendants Robert Woon and Mary Gurley. From this order the bank appealed.

R. M. Wells and *G. T. Blackstock*, for the appellants, contended that the moneys collected by the receiver were in effect *in custodia legis*; and by its officer, the receiver, merely held it for whoever might ultimately be found entitled: *Kerr on Receivers*, 117, 121; *McDonnell v. White*, 11 H. L. Ca. 570. They also contended that the rule of equity is, that any one whose rights are interfered with by the appointment may, on making a proper application to the Court, obtain all that they may require; and the Court has power and will always take care to give a party who applies in a regular manner for the protection of his rights the means of obtaining justice, and will even assist him in asserting that right so that he may obtain the benefit of it: *Angel v. Smith*, 9 Vesey 355; *Russel v. East Anglican Co.* 3 M. & G. 117; *Evelyn v. Lewis*, 3 Hare 475; *Hawkins v. Gathercole*, 1 Drew 17. *Brooks v. Greathead*, 1 J. & W. 176; *Gooch v. Haworth*, 3 Bea. 428; *Potts v. Warwick*, Kay 148. Here it was shewn that Mary Gurley was entitled to the annual profits and income of the estate (about \$2,000) for her life; and in the absence of the receiver the appellants and all other creditors of Mary Gurley could have seized the money in her hands, or otherwise have enforced their claims. By the appointment of that officer the sheriff had been prevented from seizing, and the rights of the appellants had in this and other respects been interfered with, but which they submitted had not been destroyed by such appointment in

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a suit to which they were not parties; and that this Court could order the receiver to pay the appellants' claim out of the moneys in his hands, instead of to Mary Gurley, without in any degree contravening the doctrine as to equitable garnishment enunciated in *Horsley v. Cox*, L. R. 4 Ch. 92; *Gilbert v. Jarvis*, 16 Gr. 295; *Fisken v. Brooke*, 4 App. R. 8, which were decided upon entirely different principles, and had no application whatever to this case; and that since the passing of the Judicature Act in England there was no difference between the garnishing of legal and equitable debts: *Wilson v. Dundas*, Weekly Notes, 1875, p. 232: nor is there any such difference in this country since the passing of the Administration of Justice Act. And that, under the circumstances, the Court might either order the receiver to pay the appellants' claim or order the tenants of the estate to attorn to the appellants, or to permit the sheriff to enforce the execution against moneys in the hands of the receiver; for unless the appellants succeeded in this appeal they would be without remedy, as they were not at liberty to garnish the moneys in the hands of the receiver without leave of the Court; to do so might render them liable to be proceeded against as for a contempt: *De Winton v. Breton*, 28 Bea. 200.

W. Cassels, for the respondent, Mary Gurley. The debt of which payment is sought by the appellants is upon a judgment recovered in an action at law, and the appellants do not shew that they have exhausted their legal remedies for the satisfaction of their debt, or that it is by reason of the appointment of the receiver in the cause that they are prevented from enforcing payment of their debt. The corpus of the estate of which Mrs. Gurley is entitled to receive the income consists of a mixed fund of realty and personalty, and the estate of this respondent in such realty is a freehold estate assignable without the assent of any other person for her own benefit, and as such is exigible at law. But the appellants have not sued out the necessary process against such real estate, and they cannot be heard to say that they are hindered in the recovery of their debt

by the appointment of the receiver; neither do the appellants shew that against her interest in the personalty they have issued any process upon their judgment at law, which was at the time of filing their petition or is now in force, or which has been prevented from taking effect by reason of the appointment of the receiver. It would therefore seem as if the appellants are seeking the aid of the Court of Chancery for the satisfaction of their debt recovered at law, not because their legal process is interfered with by the appointment of the receiver, but because they desire to fix a charge upon an interest coming to this respondent out of personalty, which will not be ordered. *Blake v Jarvis*, 16 Gr. 295, and sec. 46 of the R. S. O. ch. 38, were also referred to.

J. Roaf, for the respondent Woon.

24th March, 1882. SPRAGGE, C. J. O.—Under the will of John Cade, the former husband of the defendant Mary Gurley, she was tenant for life of the real estate, having the legal estate in the land devised to her. She was also entitled for life to the proceeds of the personal estate, after payment of debts, the legal title to the personalty being in the executors.

The petitioners The Bank of Commerce are judgment creditors of Mary Gurley. At the date of filing their petition they had sued out a *fi. fa.* against her goods, which had been returned *nulla bona*, but they had not sued out a writ against lands.

First, as to the personalty; to what remedy of the judgment creditor was the appointment of a receiver an impediment. It was not an impediment if the creditor could have had against the receiver the same remedy, or as good and effectual a remedy, against the personalty of the debtor as he would have had against the personalty if a receiver had not been appointed. For the creditor it is contended that he would have had a remedy by garnishee proceedings. The remedy would have been by taking garnishee proceedings against the executors, attaching

moneys in their hands to which Mary Gurley was entitled, and which constituted a debt payable by them to her. If such moneys in their hands were a legal debt, I assume that the creditor might have taken such proceedings. If an equitable debt he would not, as was held in *Horsley v. Cox*, 4 Ch. 92, and in the cases in our own courts following that case. Under the Judicature Act, 1881, Order 41, for "Attachment of Debts," a creditor may attach any debt due by any other person to his judgment debtor, making no distinction between what were legal debts garnishable under the Common Law Procedure Act, and equitable debts, which it has been decided could not at that date be garnished. In a case before Hall, V. C., very similar in its circumstances to the case before us in regard to the debt, and on what account due, and in regard to the fact also of a receiver having been appointed—*In re Cowans' Estate*, 14 Ch. D. 638—it was held that moneys payable to a legatee under a will, and which under an Order of Court were to be received by a receiver appointed by the Court and by him paid to the legatee, might be garnished in the hands of the receiver, the receiver himself being the garnishee. The provision in our Judicature Act, Order 41, is taken from the English Act. And so it would have been competent and proper for the creditor in this case, if our Judicature Act had passed when he presented his petition, to have taken garnishee proceedings against the receiver, instead of taking the course that he has done.

I express no decided opinion whether or not he might not have done so under the Administration of Justice Act of 1873 which gave to the then Courts of Common Law cognizance generally in cases of a purely money demand; but it is not necessary in this case to consider that point, for the creditor has not sought any remedy in that shape, and it does not appear from the facts existing in this case that he was in a position to make the necessary affidavit, inasmuch as he would have to prove that there was a debt due by the executors to his debtor, and, as was held in *Horsley v. Cox*, L. R., 4 Ch. 92, that he had taken proceed-

ings under the Common Law Procedure Act to garnish that debt, and that is assuming that before the passing of the Judicature Act moneys payable by an executor to the person entitled when received were moneys that should be garnished.

Then, was the creditor in a position to sell any of the personal estate? If Mary Gurley had been absolutely entitled, instead of being only entitled to what the will calls the annual profits as income, the securities representing the personalty might have been sold by the sheriff; but looking at the provisions of the Act making such securities exigible, and how they are to be dealt with by the sheriff and the creditor, it is difficult to see how they can apply to securities to which the debtor is not entitled. As to money in the hands of the debtor herself, that is not interfered with by the appointment of the Receiver, it still remains exigible under the *fi fa.* against goods.

There still remains to be dealt with the question of the real estate, a life estate in which is devised to the judgment debtor, and the rents and profits of which the receiver is appointed to receive. As to that, the trouble is, that at the time of the creditor's petition being presented he had not issued execution against lands, and so had not acquired a *locus standi* which was interfered with by the appointment of a receiver. He would have acquired such *locus standi* if he had issued his *fi fa.* We are informed that it had been issued before the hearing of the appeal, but had not issued when the petition was heard.

It would appear therefore that at the date of the petition being presented the creditor had not placed himself in a position in regard either to the personalty or realty which gave him rights as to either, which were interfered with by the appointment of the receiver. We think that we may nevertheless give him relief upon terms which might have been given him in the Court below as to the real estate, and which may properly be given now under the Judicature Act as to personalty.

The case before Hall, V. C., in giving direct relief to the

creditor by placing the receiver himself in the position of a garnishee, goes further, I believe, than any case that preceded it; but the reasoning upon which the judgment proceeds commends itself for its soundness and good sense, and does not seem to have been questioned since. It is a decision which we should be glad to follow; and, as the Judicature Act of this province has since been passed, making the same provision as to the garnishment of debts as had been made in England when *In re Cowans' Estate*, 14 Ch. D. 638, was decided, we may properly follow that case in the one before us, and leave the creditor now to pursue his remedy as to the personalty, as he may now do under the Judicature Act; and, as to the realty, to remove the impediment created by the appointment of a receiver, and leave him to take such remedy as he may be advised to take, as was done by Lord Langdale in the case of *Gooch v. Howarth*, 3 Beav. 428.

The learned Vice Chancellor, before whom the petition was heard, was, as we think, right in dismissing it. The petitioner therefore can now have the relief which I have indicated may be given to him only upon payment of the costs of the appeal and of the proceedings in the Court below upon the petition.

BURTON, J. A.—The petitioners appear to have taken the proceedings they were advised to take under a misapprehension of their legal rights.

It was no doubt necessary before proceeding to a seizure and sale of Mrs. Gurley's life estate in the lands to apply to the Court of Chancery for permission to do so, inasmuch as the receiver was in possession, and such a permission would have been as of course, and no such relief is sought for in this petition. The prayer is directed to the payment, out of moneys in the receiver's hands, of the judgment and costs, and that the petitioners may be at liberty to attach the life estate, which it is represented the petitioners are prevented doing by reason of the appointment of the receiver having reference to such an interest as might have

been reached by a *fi. fa.* goods or other appropriate proceeding.

The specific relief sought in reference to the real estate was, that the tenants should be directed to attorn to the petitioners, and that the petitioners might be put in possession of the rents and profits and the receiver ordered to give up possession of the estate to them.

It was stated upon the argument that in point of fact when the petition was filed no *fi. fa.* lands was in the hands of the sheriff, and the case was argued, as we are informed, in the Court below as well as before us, mainly on the right of the creditors to reach by some means the annual and other dividends payable out of the personal estate.

But for the decision to which I shall presently refer it is difficult to see how these dividends could be reached.

It was decided in *Horsley v. Cox*, L. R. 4 Ch. 92, and that decision has ever since been followed, that as a Court of Equity only interfered to aid an execution where there was an outstanding legal interest every thing must be done which at law could be done.

The judgment creditor must have got his writ of *fi. fa.* and lodged it in the sheriff's hands before he could go to a Court of Equity to aid him, and so by analogy it was held that there ought to be some corresponding process in the nature of an attachment against the debt sought to be garnished before a bill was filed, and that every right should exist to make the analogy complete at the time of the filing of the bill which the judgment creditor would have at law except for the legal obstacle which intervened.

In the present case, if no receiver had been appointed, it may be that the creditors might have attached the moneys from time to time payable by the executors to the respondent; it is unnecessary to express any opinion how that would be; but there was not, at the time of the recovery of the judgment or since, any money payable by the executors to her, which, but for the interposition of the receiver, the creditors could enforce, as the moneys due

to her have been, during all this time, received by and paid over from time to time by him to her.

There never was a time when the appointment of the receiver interfered with the right to attach any debt, if we except the small sum payable as rent, some \$20, and as to that no attachment was issued, for the execution of which the aid of the Court of Equity was sought.

The moneys sought to be reached are moneys payable to the respondent by the receiver, and the question would seem to be rather whether these moneys could be attached in the receiver's hands, whether he is, in other words, to be considered as a debtor within the meaning of the Rule 370, of our Judicature Act, which is the same as Rule 2 of Order 45, of the English Judicature Act.

At the time of the passing of the Common Law Procedure Act, the garnishee clauses applied only to the case of debts payment of which was capable of being enforced in the Common Law Courts, but by the Act of 1873 any person having a purely money demand may proceed for the recovery thereof by an action at law, although his right to recover may be an equitable one only ; so that at the time of the re-enacting of the garnishee clauses by the Judicature Act, the word debt had a more extended meaning, and included equitable debts, and I apprehend that at the present time, if the fund in question were payable by the executors to the respondent, it would be garnishable.

A recent decision of Hall, V. C., *In re Cowans' Estate*, L. R. 14 Ch. D. 638, extends this doctrine, and holds that moneys payable under an Order of a Court, but in the hands of a receiver, are liable to garnishment to the same extent as if the fund were not in Court, but in the hands of a trustee, whose duty it was to pay it over to the debtor ; and the learned Judge held further that the attaching clauses were not confined as has been sometimes decided to a debt existing at the time but payable in futuro, but should in a case like the present extend to the income from time to time becoming payable to the debtor.

If that case be well decided, and it commends itself to one's ideas of justice and common sense, the petitioners have a complete remedy by garnishee process; and whether they could or could not at the time of the filing the petition have adopted that mode of proceeding, it is manifest that no case was made upon the petition for the aid of a Court of Equity; but under the prayer of the petition for general relief, we think we should be justified in granting permission, to the petitioners, as was done in *Gooch v. Howarth*, 3 Beav. 428, to sue out or execute such writs as they may be advised; but as this was not the object sought for in the petition it is granted *ex gratia* to save the petitioners the expense of making a distinct application to the Court, and ought not to interfere with the respondents' right to costs to which they would have been entitled if the appeal had been dismissed.

The order, therefore, of the Court will be as indicated, and that the respondents be entitled to their costs upon this appeal.

PATTERSON and MORRISON, JJ. A., concurred.

BIRKETT ET AL. V. M'GUIRE ET AL.

Partners—Principal and surety—Giving time to principal.

H. & M. were carrying on business in co-partnership, and H. becoming dissatisfied with the manner in which the business was conducted, a dissolution was agreed upon, in October, 1876, with the knowledge and approval of the plaintiffs, one of them having assisted in arranging it, H. retiring and assigning to M. his interest in the partnership assets, in consideration of \$1,332, for which M. gave his promissory notes at three, six, nine, and twelve months, and bound himself to pay all the debts of the co-partnership. M. continued to carry on the business, and in doing so had several transactions with the plaintiffs, from whom he continued to receive goods on credit, giving promissory notes for the price as well as to cover the firm's indebtedness, during which time the plaintiffs rendered periodical statements to M.—ignoring apparently the existence of H.—in which the liabilities of the firm and M. were embraced; although expressed "M. and H. Liability," giving the items, and "J. M. Liability," also detailing the items. M., by means of contra accounts against H., had reduced the latter's claim to about \$400. In November or December, 1876, the plaintiffs applied to H. to renew the partnership notes, but this he declined to do on the ground that he was not liable, notwithstanding which the plaintiffs continued to deal with M. until he became insolvent in January, 1880, when they instituted proceedings against both partners to recover their claim.

Held, [PATTERSON, J. A., dissenting] reversing the finding of Cameron, J., that the effect of the dealings between H. and M. was not to constitute H. a surety for M., and that he and M. remained liable to the plaintiffs for the partnership debts.

THIS was an appeal by the plaintiffs from a judgment of the Court of Common Pleas, rendered by the Hon. Mr. Justice Cameron, sitting alone as and for that Court, in a cause pending therein, wherein William Birkett and John Bell were plaintiffs, and James McGuire and William Hutton were defendants, which action was brought to recover the sum of \$1,122.69 with interest from 2nd October, 1879, alleged to be due by the defendants to the plaintiffs under the circumstances appearing in the report of the case, 31 C. P. 430, and in the judgment on the present appeal.

In addition to the facts there appearing, the defendant Hutton was examined on the trial and in his evidence swore

"I remember Bell being up at Wingham after dissolution of firm of McGuire & Hutton. He and McGuire called and wished me to sign a written document 'H.'" I told Bell all the time I had been in business

*Set forth at page 433 of report.

I had never received any statement. The memorandum 'I' (produced) was drawn up by Bell, shewing a balance of \$2,498 above all liabilities, but I still declined to sign the document 'H,' and told him if he wished he could wind the thing up, as according to his own shewing there was plenty to pay up everyone. Some time after McGuire became insolvent I received a notice of a note past due over five years, which the holder threatened to sue me upon, for \$400. I had my claim drawn up by Mr. Cameron's clerk, and gave him all the books and papers and bond. I have not received a shilling from McGuire since dissolution. At the time we dissolved McGuire had to pay me \$1,332 (marked Exhibit 'W'). This represented the amount of capital I had in the business at eight per cent. There is now due to me in respect of that amount the two notes annexed to the claim, less McGuire's contra account of \$144.54. My claim is reduced therefore to about \$400 and some interest. I think I have received interest all through at eight per cent. I think it was by store bill all the way through. I do not know where Bell got the data upon which he drew up the statement referred to."

Bruce, for the appellants, contended that the respondents were jointly liable upon the notes sued on, and Hutton had failed to establish that the same were paid: that the sums of money received by the appellants from McGuire were by express stipulation to apply on his own indebtedness to the appellants, and were so appropriated at the times of each respective payment, and such appropriations were shewn by the statements rendered to McGuire, and assented to by him and acted on by the appellants; and that no ground existed for urging that Hutton was released or discharged by McGuire, giving his separate notes for portions of the joint indebtedness, or by the dealings between the appellants and McGuire, and that the equitable plea proposed by Hutton did not disclose a defence, but if it did it was not proved; and in any event should not have been allowed to be added.

In addition to the cases mentioned in the judgment he^{*} referred to *Bedford v. Deakin*, 3 B. & Ald. 210; *Fitch v. McCrimmon*, 30 C. P. 183; *Oakford v. European and American Steam Co.*, 1 H. & M. 182; *City Discount Co. v. McLean*, L. R. 9 C. P. 692; *Munger* on Application of Payments, pp. 17, 33, 41, 44, 49, 75, 120; *Lindley* on Partnership, 3rd ed., pp. 454 to 458.

^{*} Statement of assets of partnership.

McKelcan, Q. C., *contra*, urged that the plaintiffs' claim had been extinguished by the payments received by them from time to time as shewn by the evidence and exhibits; and that the plaintiffs having blended the accounts of McGuire & Hutton and James McGuire, the payments should have been appropriated in the order of date to the items on the debit side in the order of date, and thus the notes received by the plaintiffs from McGuire must be treated as having been so received in satisfaction of the firm debts. He also contended that the effect of the plaintiffs' mode of dealing with the account of which the notes sued on formed part, and giving time to the defendant McGuire after the dissolution of the partnership between him and Hutton without the consent of the latter, was to discharge Hutton from liability: *Bailey v. Griffith*, 40 U. C. R. 418; *Evans v. Drummond*, 4 Esp. 89.

March 24, 1882. BURTON, J. A.—Two questions arise upon this appeal: 1st, Whether the respondent Hutton was released from a joint liability which he had incurred to the plaintiffs as partner with McGuire by their subsequent dealings with the latter, as set up in the equitable plea proposed to be added when the case was before the arbitrator; and, 2nd, if not so released, whether the joint debt was discharged by payments made from time to time by McGuire since the dissolution; this latter point depending upon the question of whether the facts in evidence establish a blending of the old and new accounts, in which case I assume there can be no question that the creditors would be precluded from saying that the payments made since the dissolution should be applied otherwise than in discharge of the earlier items of the account.

The first of these is purely a question of law, and may be considered in the same way as if it had come up for decision on a demurrer to the equitable plea, which sets forth that, at the time of the making the notes in question, the defendant Hutton carried on business in partnership with McGuire, and that the partnership was subsequently dis-

solved, and upon the dissolution Hutton assigned all his interest to McGuire, who in consideration thereof agreed to discharge the debts of the partnership; and that the plaintiffs had full notice of the premises, and having such notice took from McGuire his separate promissory notes for and on account of the promissory notes declared on, which were payable at dates and times subsequent to the dates at which the notes declared on matured, and thereby gave time for the payment of the moneys owing upon those notes.

It would have appeared to me too clear for argument, but for the differences of opinion in some of the cases to which we have been referred, that such a plea could afford no answer to the action. The doctrine that the taking of a security having some time to run from the principal debtor discharges the surety can, I should say, have no application where the relation of principal and surety did not exist between the creditor and the person claiming the benefit of the rule.

I can perfectly well understand that, where a person becomes the holder of a negotiable security upon which the persons filling the position of makers or acceptors are apparently liable as principals, but are in point of fact as between themselves principal and surety only, that the communication of that fact at any time to the creditor affects him in the same manner as if he had been originally a party to the contract; and that any dealing whereby indulgence was granted to the principal would discharge the surety. But to hold that a creditor holding a promissory note of two joint debtors to himself should be affected by any arrangement subsequently entered into between those debtors to which he was no party, by which his rights and remedies are to be restricted or interfered with, appears to me to be contrary to good sense, and to have no warrant in law.

The case of *Oakeley v. Pasheller*, 4 Cl. & F. 207, in the House of Lords, by which some of the Irish Judges conceived themselves to be bound in the case of *Maingay v. Lewis*, reported in Irish Reports, 3 C. L. 495, and again in

appeal in Irish Reports, 5 C. L. 229, is distinguished in the case of *Swire v. Redman*, L. R. 1 Q. B. D. 536, where the Court intimate that it was a mistake to suppose that any such point as arises upon this plea either arose or was decided.

After suggesting that the case is very imperfectly reported, both in *Clark* and *Finnelly* and in 10 Bligh, the Court remark that the decision appears to have proceeded on the ground that, by an arrangement to which the creditor was a party, Kynaston, who was the creditor's son-in-law, became a partner in the house which was indebted to the creditor, and then, by arrangement between the three parties, Kynaston became a principal debtor to the creditor and the other parties sureties for Kynaston. The creditor there for good consideration agreed to the change, Kynaston became the debtor with the consent of the creditor, and they assumed a new liability as sureties.

It was suggested by a member of the Court during the argument that this case would be on all fours with *Swire v. Redman* but for the continuance of dealings between the parties by the sale of new goods, a fact not apparent in *Swire v. Redman*; but that circumstance can be of no importance on this branch of the case, which is simply whether if this plea were proved it would amount to any defence, whatever bearing it may have upon the other question of appropriation of payment.

Mr. Justice Cameron sitting alone felt constrained to follow the case of *Bailey v. Griffith*, 40 U. C. R. 418, in our own, rather than *Swire v. Redman* in the English Court. Sitting here as a Court of Appeal we are not so fettered, and I think that both reason and authority are in favour of the decision of the English Court of Queen's Bench, and that it is manifest that the case in the House of Lords proceeded upon the grounds there suggested.

No reply was made by counsel to the inquiry of Lord Lyndhurst during the argument, "Can you cite any authority to the effect that two original debtors can by arrangement among themselves convert one into a surety

only for the principal debtor?" And, so far as I have been able to ascertain, no authority is to be found for such a position prior to *Oakeley v. Pasheller*. They become so no doubt *inter se*, but the creditors are not affected by that arrangement. It is to be remembered that in that case Kynaston was not originally liable for the debt. It is out of the question therefore to say that the executors of Sherard could ever have been liable for his default except in consequence of some arrangement whereby they became sureties for him.

It appears by the recitals in the deed of June, 1815, that an arrangement had been come to between Reid and the executors of Sherard by which he undertook to pay the joint debts of the firm, and Kynaston covenanted that they would enter into a bond to indemnify them accordingly.

The case in the House of Lords then states that they (Reid and Kynaston) carried on business till 1826, when Reid died. That they adopted the debt of Sir Charles Oakley, gave him credit for it in account, and paid interest upon it. In the correspondence it was referred to as the debt of Reid and Kynaston, and it was in all respects treated as a debt from them. When the bonds became due in 1817 and 1818 no application was made to the executors for payment. A decree to administer Sherard's estate was made in 1818 and advertisements issued calling upon creditors to come in and prove their debts; but no claim was made at that time, and it was not until 1823 that any question was raised as to the liability of the executors.

I should have supposed that the dealing in this way by the creditor was an adoption of the new firm as debtors, and the Master of the Rolls refers to them as the principal debtors, which they never could have been without some new arrangement with Sir Charles Oakeley, as Kynaston was not originally liable to him. I should have supposed this course of dealing in itself sufficient to release the executors of the deceased partner, and that they could not have become liable as sureties except by express agreement.

The case of *Vernam v. Harris*, 1 Hun N. Y. 451 (a), is one very similar to the present in its facts, and in giving judgment in that case it was said the rule that a surety is discharged by the giving of time to the principal may be conceded without however its entering into the determination of the case. The defendants were both principals. Harris sold out to Crocker with an agreement that Crocker should pay the firm debts. Crocker attempted to pay the firm debts by giving his note to the plaintiffs at thirty days, which was not paid ; and although the plaintiffs knew of the terms of the dissolution, it was held that the defendant was not discharged.

The case of *Rawson v. Taylor*, 30 Ohio St. R. 389, in the Supreme Court of the State of Ohio, is to the same effect. The Court there refers to the distinction between a case where the relation of principal and surety existed *inter se* at the time the obligation was entered into, of which the creditor had knowledge, and a case of joint principals *inter se* at the date of the obligation, and a subsequent agreement between the joint debtors by which, as between themselves, one becomes a surety of the other, of which subsequent arrangement the creditor had knowledge ; and proceed to point out that it is of the first importance to keep in mind the distinction, as it furnishes the key to harmonize many apparently conflicting decisions. In the former case the relationship of principal and surety exists at the very inception of the contract. The obligee having knowledge of that relation takes it subject to all the rights and equities of such sureties *inter se* not inconsistent with the terms of the contract, although it seems a rather harsh rule which fixes him with such a liability where he acquires knowledge, not at the time he accepts the security, but subsequently. Still there is a broad distinction between such a case and one where the debtors were joint debtors to him originally, no equity then existing ; there the original legal liability is not to be cut down or varied by something done by the debtors subsequently. Mr. Story refers to it

(a) 8 N. Y. Sup. Ct.

in a similar way. After saying that no such arrangement can vary the rights of the existing creditors, he proceeds : " But in all cases of this sort it may be stated, as a general doctrine, that if the arrangement is made known to the creditor, and he assents to it, and by his subsequent act or conduct, or binding contract, he agrees to consider the remaining partners as *his exclusive debtors*, he may lose all right and claim against the retiring partner ;" and then gives instances. " But," he adds, " the mere fact of the creditors taking an additional security from the new firm without surrendering the old, or of his receiving interest from the new firm without varying from that due on the old debt, or of his acquiescing in delay without contracting upon any new consideration to prolong the credit, will not absolve the retiring partner from his original responsibility : " *Story on Partnership*, 7th ed., sec. 158.

In the present case the plea proposed to be added does not pretend to set up that the creditor accepted the one partner as his exclusive debtor, but relies simply on the fact that the arrangement was made between themselves and that the creditor had notice of it, and having notice gave time. But we have it in evidence that the old notes were retained, and Hutton could not be prejudiced by the taking of the new notes, as he might at any time have paid the debt and proceeded against the other maker.

Before proceeding to the other branch of the subject I desire to say that I do not quite concur with Mr. Justice Cameron's view that " justice is entirely with the defendant Hutton."

It appears that the firm of Hutton & McGuire did business together in co-partnership for some three years previously to October, 1876, and that the plaintiffs were their principal creditors ; that their liabilities amounted to \$3,690, of which \$1,518.86 was due to the plaintiffs, leaving an apparent surplus of \$2,498, of which Hutton was entitled to be credited on the realization of the assets, \$1,017.

It appears that upon the dissolution he received notes from his partner amounting to \$1,332, with interest at

eight per cent. ; and although on his examination he at first denied that he had received a cent of this, it appears that in addition to the payments of interest he had received payments on account of principal reducing his claim to \$405, whilst his creditors had received only \$851, unless the payments made by McGuire and applied on account of the new purchases must be held to be made on account of the old indebtedness, McGuire being still indebted, notwithstanding such payments on the new account, \$2,855.26. The fact that McGuire was paying Hutton from the proceeds of the plaintiffs' goods was the subject of constant complaint by the plaintiffs, and apparently not without some reason, although it is a subject upon which much may be said on both sides. Whatever therefore may be the legal result of the plaintiffs' dealings with McGuire, it does not strike me upon the evidence that it is a case necessarily calling for any expression of sympathy for the defendants, if we could allow ourselves to be influenced at all by considerations of that nature.

The only question, as it seems to me, that is open to discussion in this case, is, whether the learned arbitrator took the correct view of the law as to the application of the payments.

The rule is well established that, where no appropriation is made by either party and there is one continuous account of several items, the payments will be applied on the account according to the priority of time : that is, the first item on the debit side is discharged or reduced by the first item on the credit side. But this is not an artificial or arbitrary principle, but one founded on the *presumed intention* of the parties, and is applicable only where there is no evidence sufficient to shew a different intention. Where there is such evidence, the presumption fails ; and such evidence may consist of any facts and circumstances from which the intention of the parties may properly be inferred.

Two questions of fact arise in the present case : first, whether there was such a blending of the accounts as was

held to exist in *Hooper v. Keay*, L. R. 1 Q. B. D. 178 ; and, secondly, whether there was evidence to shew that McGuire, having the right to make the appropriation of the payments, did actually make them.

In *Hooper v. Keay* the plaintiffs continued to give credit to Keay just as before, and received payments from him on account. An account was rendered headed "Mr. Keay, Dr. to Hooper & Co.," commencing with an acceptance of the old firm, then items supplied to Keay alone—no distinction drawn, and no explanation attempted to be given—so that the presumption was, that all parties had consented that it should be considered as one entire account; and the payments were credited generally.

It was intimated by Blackburn, J., that if this account had been only in the plaintiffs' ledger it would not have bound them; but, having been rendered as one entire account, it was held to be impossible to say that the general principle did not apply, viz., that the payments should be appropriated in the order of date to the items of debit in order of date. But it is obvious that transactions may be, and often are, entered together in the form of one general account for the purpose of more readily ascertaining the state of all the affairs between them, or for some purpose of mere personal convenience: *Dulles v. DeForest*, 19 Conn. 190. And it would be highly unreasonable if an inflexible rule of inference should be adopted which would preclude the parties from shewing in such a case what was their real object and intention.

In *Simson v. Ingham*, 2 B. & C. 65, the bankers had kept the transactions of the old and new firms in one entire account in their books; but it was held that the rule in question did not apply, for the reason that the creditors had when rendering the account separated the accounts of the new and old firms, and had applied the payments made by the late firm to the indebtedness of that firm, although it was strenuously insisted that at that period of time they had no right so to do, because they were precluded by the entries which they had already made in their books in the intermediate space of time.

The case of *Williams v. Rawlinson*, 10 J. B. Moore 362, is the converse of this case, and was one of principal and surety, but is important as shewing the effect of conduct in governing the application of payments. Chief Justice Best, in the course of his judgment, remarks: "One fact is extremely strong against the defendant, viz., that his principal agreed to the application of the payments by the plaintiffs to the old balance, as he saw the accounts every fortnight and received vouchers half yearly, and he must consequently have seen, when the first half yearly vouchers were sent in, that the sums remitted by him subsequently to the giving of the bond had been applied by the plaintiffs in liquidation of the old balance. If, therefore, the principal consented to such an appropriation there is an end of the question, for he clearly had an option as to which account the payments should be applied to, and he alone had an unfettered right in this respect, and over which the defendant as surety could have no control unless there was an express or distinct agreement entered into at the time of the execution of the bond, which cannot be collected or even inferred from anything that appears on the face of that instrument."

In partnership transactions no unusual principles or mode of application are called into requisition.

In *Smith v. Wigley*, 3 M. & Scott, 174, it was held that in the absence of any specific appropriation by either party payments made by the continuing partner after the dissolution must go in reduction of the entire account, and consequently must discharge the earlier items, following the rule laid down in Clayton's case, 1 Mer. 172; *Bodenham v. Purchas*, 2 B. & A. 39, and *Simson v. Ingham*, 2 B. & C. 65.

In *Simson v. Cooke*, 1 Bing. 452, the Chief Justice said: "The only remaining question is, whether on the evidence adduced at the trial any part of the balance due from Cooke & Co at the time of the death of Thomas Cooke is still due. Now, at the time of his death no rest or distinction was made in the accounts, but they still went on as if nothing had happened, and the remittances subsequent to the death of Thomas Cooke are more than sufficient

to cover the balance then due. Several cases have been referred to, particularly that of *Bodenham v. Purchas*, which establish it as a principle that where a debtor makes no specific appropriation of a sum remitted to account, the creditor is bound to apply it in liquidation of the earliest balance due from the debtor. That principle applies here."

In *Pemberton v. Oakes*, 4 Russ. 154; *Hooper v. Keay*, above referred to; *Toulmin v. Copland*, 3 Y. & C. 625, and 2 Cl. & F. 681; and *Bank of Scotland v. Christie*, 8 Cl. & F. 214, the facts were not distinguishable in substance from those in *Smith v. Wigley* and *Simson v. Cooke*, and they were similarly decided, the last two by the House of Lords.

In *Toulmin v. Copland*, 3 Y. & C. 625, the principle on which these decisions are based is well stated, and the judgment concludes as follows: "From the very nature of the account, without the application of any legal rule, the old balance becomes a balance in which the new house is interested, and becomes absorbed and satisfied by the subsequent payments made, unless there be some agreement to the contrary. So, on the other hand, with respect to the accounts of the creditors of the house. Some of the customers have money in their hands, the house renders accounts to those customers, giving them credit for the moneys which the old house owed to them and carrying on the account with them, soliciting a continuance of their favours and making themselves their debtors."

A similar rule has been adopted in the United States, where it has been held that the payments and credits made by one partner after a dissolution of the partnership and joint agency, and after a new individual agency (sic in the report) in him, cannot rightly be applied to the extinguishment of a debt of the partnership, unless the attendant circumstances justify a presumption that the debt of the partnership has been adopted as his individual debt, and brought into account as such, or the payments and credits were intended by the parties to be so actually applied: *Gass v. Stinson*, 3 Sumn. 98; *Johnston v. Boone*, 2 Harr.

172; the presumption being, that a payment is made on account of the separate debt, unless a different appropriation is proved to have been intended, as by the adoption of the joint as a several debt in a subsequent account, and payments made on the general account. See *Livermore v. Claridge*, 33 Maine 428.

This then being the state of the law, what were the facts in this case established in evidence?

The evidence of Mr. Bell is not in the slightest point contradicted or impugned, and taken in connection with the letter of the 24th November 1876, what does it establish?

The dissolution was upon the 14th October, 1876. The letter to McGuire, I refer to, was on the 24th of the following month.

In that letter the plaintiffs refer to the fact that Hutton under legal advice had refused to sign an agreement to grant renewal notes for the then existing indebtedness of the firm, and state, that under those circumstances, they could give no renewals of the old firm's paper, but must ask him to make special efforts to have it paid up—that they should specially like to have those drafts which they had made upon the old firm due 20th December and 20th January taken out of the way.

It goes on to warn McGuire not to pay Hutton in competition with the creditors of the firm, and then proceeds: "*Keep your old indebtedness (that is the indebtedness of the old firm) separate from your new liabilities (and for this purpose you should get a new ledger), and then when you remit on old indebtedness say so.*"

It is evident therefore that the plaintiffs were fully alive to the necessity of keeping the accounts distinct, and desired McGuire if he wished that any payments made should be credited on the firm's indebtedness to say so. In the absence of such directions the plaintiffs would seem to have been at liberty to regard it as a specific appropriation by the debtor to his separate account, or to be at liberty to make the appropriation themselves; but the credits when made were communicated monthly to McGuire and assented to

by him. Mr. Bell then says: "I rendered statements to McGuire tacked together and marked M. [the statements printed are *specimens**, of these statements]. In all the statements rendered McGuire I kept the two accounts of Hutton and McGuire distinct after the dissolution. * * The course of dealing was in this way: When McGuire would buy a bill of goods we would take his note to close that transaction, and so on; and we also took notes on account of the Hutton and McGuire indebtedness, but not to the exact amount of it. We did not want to close the old account with McGuire or part from Hutton, and that is the reason we kept the debt floating and used the notes for banking purposes. The notes were taken on the firm account for arbitrary sums as we might require them. It was our intention to retain the liability of McGuire and Hutton until the firm debt was paid. The cash payments credited in Exhibit P, were specially applied on the old account, and the drafts appearing to have been made and paid by McGuire were so done on the distinct understanding with McGuire that they were to be applied on the firm account. We wrote him so at the time. The credits in Exhibit J. were made and applied at the time on McGuire's own purchases."

He further shews that the statements were not all of the same character, some being made up without interest for the purpose of shewing approximately the amount due and uncovered, with a view to getting accommodation paper to cover a portion of it, or, in other words, to satisfy McGuire that he was not giving paper in excess of his actual indebtedness on both accounts. The other shewing the actual indebtedness, with interest, and the actual appropriation of the payments.

It is further to be noted in this connection that up to the 18th June, 1878, notes taken from McGuire for his own purchases were taken for the exact amount; after that for arbitrary amounts; and drafts in the same way.

It is clear that applying the rule I have quoted to the present case, if McGuire had desired the payments made

from time to time to be applied on his new indebtedness, they must have been so credited. It is also clear that unless the old account was treated as McGuire's private debt and blended with his own, in the absence of appropriation by him, his creditors could apply it as they thought proper.

What is the natural and proper inference to draw as to the intention of the parties from the facts and circumstances in evidence? We have it in evidence that it was the intention of the plaintiffs communicated to McGuire and Hutton (although it was not legally necessary to keep the latter advised) that they intended to retain their hold upon the old firm, and not to bring the partnership debt into the account as the individual debt of McGuire.

That whilst they left it optional with McGuire to apply his payments either to the old or new debt, they stipulated that any payments intended to be applied on the old debt should be specifically so appropriated. That the accounts made about the first of each month were accurately made up with interest, and the payments thereon specifically appropriated in accordance with the terms of the letter forwarded to and received and approved of by McGuire, which would be equivalent to an appropriation even if there had been no agreement to that effect. That there is evidence that the other statements were made not with the view of shewing an appropriation, for in point of fact no appropriation was made or intended to be made until the money was received, but the paper was received merely for banking purposes, to enable the plaintiffs to use the capital invested in the goods represented by the account against Hutton & McGuire; and that evidence is not contradicted or impugned in any way.

I have already shewn that the taking of these separate notes and drafts could not in itself militate against the plaintiffs' right to recover on the original debt, neither can the payment of any of them, unless it is established that they were so appropriated by the defendant McGuire, or

the plaintiffs have so dealt with the account that, as a matter of law, they must be so applied.

The accounts printed are, as I have already said, mere extracts from the accounts, although I have called for all the accounts and have made a personal investigation of them from the opening to the close of the account. Mr. MacKelcan selects one of these statements for January, 1878, (it being conceded that the date 7th is a clerical error.) That statement then is as follows :

HAMILTON, January, 1878.

Mr. JAS. MCGUIRE,

To THOMPSON, BIRKETT & BELL,
1877. *McGuire & Hutton, Indebtedness.*

Dec. 1. To amount due per account \$937 22
Add 32 days' interest.. 8 20

Due in cash 2nd January \$945 42

JAS. MCGUIRE, *Account.*

Dec. 1. To amount due per account
34 days 2 13 230 84
Dec. 13. To note due to-day, 22 days .. 0 74 125 64
1878.
Jan. 4. To " " ... 315 24
Add interest. 2 87

Due in cash 4th January.. \$674 59

Total overdue..... \$1,620 01

Dec. By Draft due at Wingham, 12th instant..... \$200 00

Jan. By draft at 30 days 200 00

" By promissory note at 2 months..... 674 59
Please accept draft for \$200.

And he claims that the two sums of \$200 there credited should be applied on the old debt, basing it to some extent, I presume, on the circumstance that the separate account appears to be settled by a note for \$674.59; but this is not so, as the \$674.59 was due in cash 4th January, and the note at two months. It tends rather to confirm the contention of the other side, for when we refer to the account of the 4th February, it commences with.

To amount due per account.....	\$674 59
Thirty-one days interest.	5 70
To another note due 13th January	550 63
Interest to 4th February	2 53
	<hr/>
	\$1,233 45

And then the draft referred to in the
previous statement as payable at
Wingham, is credited, with interest... 200 58

Showing amount due by McGuire on
4th February to be\$1,032 87

The same statement shews the indebtedness of McGuire
& Hutton to be, with interest to 2nd January, \$953.95;
and then to credit, *inter alia*, this very note of \$674.59;
and some other notes, amongst others \$200 due at Wing-
ham 11th February.

On the 2nd March, 1878, another statement
was sent bringing down the separate in-
debtedness on 4th February.....\$1032 87
Interest on that sum to 2nd March..... 7 34

\$1040 21

And the draft referred to in the previous
statement, which had been paid, is with
interest, then specifically credited to this
debt..... 200 47

Leaving..... \$839 74

The McGuire & Hutton indebtedness is brought
down from the previous statement, and inter-
est added, shewing the amount due on that
account to that date, 2nd March, to be..... 960 73

and the total indebtedness\$1800 47

for which the plaintiffs still held as collateral the draft for
\$250, the note for \$632.87, referred to in the previous,
statement, and two others then made, one a draft for \$200,
the other a note sent with the statement for \$617.60.

I do not think it necessary to trace this further, the
same course being pursued throughout; but I come to the
statement of 18th June, which, unexplained, makes more

strongly than some of the other statements for the defendant; McGuire being charged with the whole, and McGuire and Hutton's indebtedness being the first item; but this again confirms Mr. Bell's evidence as being a mere memorandum statement, made up without interest, and extracted from the detailed statement of the 31st May preceding.

HAMILTON, June 18th, 1878.

MR. JAMES MCGUIRE,

TO THOMSON, BIRKETT & BELL.

To amount due per account.

June	1. McGuire & Hutton.....	\$ 985 05
"	1. To account James McGuire..	2007 30

\$2992 35

To account of same.

June	15. By cash paid at Wingham..	\$100 00
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July	8. By draft due at Wingham..	200 00
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	Promissory note due 7th	
	July.....	376 04

	Promissory note due 11th	
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	August.....	367 31
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	Promissory note due 10th	
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	September.....	374 96
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1418 31

	Open balance.....	\$1574 04
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Promissory note	herewith due 27th September.	\$392 35
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"	" " " 7th October....	474 04
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"	" " " 20th October....	374 69
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\$1241 08

The account in detail of the 31st May, to which this refers, was made up separately.

The McGuire account, consisting of three items. Amount due as per

account rendered	\$1,467 31
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Interest to 1st June.....	12 73
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Note due 27th May.....	202 03
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Interest.....	0 86
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Note due 27th May.....	323 96
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Interest—5 days	0 41
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Due as cash, 1st June \$2,007 30

McGuire & Hutton's indebtedness to same date :—

Amount due 1st May.....	976 77
Interest to 1st June	8 28
	<hr/>
	\$985 05

And then a memorandum; held to account of above certain securities, some of which appear in the statement of the 18th June, whilst others had matured and been retired by the plaintiffs.

For in the statement of the 2nd July, which is one of the true statements shewing the actual debts, the balances are brought forward from the previous month, interest added, the payment received credited on the particular debt, and interest allowed on it from the time of receipt to date of account.

I have gone through all the statements, not only those printed but the whole of the accounts and statements rendered, with great care, but my labours have been greatly lessened by the aid of the memorandum which it was suggested upon the argument should be handed in by the counsel on both sides, and without which it would have been much more difficult to arrive at a correct understanding of the accounts.

I think the learned Judge has failed to give any effect to the evidence of Mr. Bell, which is uncontradicted, and is confirmed by the actual dealings between the parties for over two years. Giving effect to that evidence, and looking at the accounts themselves, it is impossible not to see that the plaintiffs studiously kept the accounts separate, applying the payments received in accordance with McGuire's directions, and the small item of \$10 credited in separate sums to the two accounts on the 17th April, 1877, is confirmatory of this view. Mr. Bell says that on that day McGuire purchased goods to the extent of \$8 and paid \$10, and the difference was carried to the old account, as there was nothing on his own account due.

That evidence and the documents produced from the possession of McGuire shew that each month a detailed state-

ment was made up with interest, crediting the sums actually received and bringing down the actual balance. That in addition to these actual statements memorandum statements were delivered generally about the middle of the month, when accommodation paper was asked for, to shew that paper was not given in excess of the actual debt, and the payments not specially appropriated to the old account were in the monthly account following the payment applied on the new, which, whether we regard them as paid in terms of the letter of November, 1876, or at the time of the rendering of each monthly statement, must equally be regarded as an appropriation by McGuire, who had the right of so appropriating.

It seems to me impossible to say that the learned arbitrator was wrong in awarding as he did, and the learned Judge has not given that effect to the evidence of Mr. Bell, (which explains the mode of dealing and rebuts the presumption which might arise from the mere perusal of the accounts,) to which it was entitled.

For these reasons I think that no case was made for interfering with the award of the arbitrator; on the contrary, that no other award could have been made consistently with the evidence; and this appeal should therefore be allowed, with costs, and the rule to set aside the award discharged, with costs.

HAGARTY, C. J.—I agree in the result arrived at by Mr. Justice Burton. I think he has satisfactorily disposed of the question of payment.

If McGuire so desired he could have directed the application of any payment to the old debt, as he had been directed to do by the plaintiffs' letter of 24th November, 1876.

I do not think that this case need necessarily be either discussed or decided on the law of principal and surety.

The plaintiffs had two principal debtors, and until they have bound themselves by some new agreement to deal with them in a different position, viz., that of principal and

surety, they have nothing to do with any arrangement between the debtors by which one is to stand in a different position towards the common creditor.

The last decision is that of Blackburn, J., and Cockburn, C. J., in *Swire v. Redman*, L. R. 1 Q. B. D. 536. It is a clear and intelligible decision, which ought to govern this case. It commends itself to my humble judgment as sound in law as in common sense, and seems a laudable attempt to escape from the net work of subtleties by which the plain rights of a creditor against his debtor were sought to be defeated by certain rules covering the relation of creditor, principal, and surety.

It may seem strange that in this apparently well considered case the decision of the House of Lords in *Liquidators of Overend Gurney & Co. v. Liquidators of the Oriental Financial Co.*, L. R. 7 H. L. 348 (1875) was not cited. But the reason probably may be found in the judgment of Blackburn, J., in *Swire v. Redman*. After noticing the cases where a creditor is notified or informed that two parties liable to him were in truth principal and surety, and not both principal debtors, he adds: "But where the two who become liable for a debt are not joint principal debtors, but from the beginning one of them is a principal and the other a surety, the case is different." The case gives no uncertain sound in the main position. "We think it clear law that a creditor who has two principal debtors may bind himself to one of them (in any way short of an absolute release) to give him time, or even not to sue him, without in the least prejudicing his right of recourse against the other."

These remarks apply especially to a part of the claim for which there had been no renewal after notice of Holt having to pay all the debts, though after notice of the partnership being at an end.

After discussing the equity rule he proceeds: "The contention is, that the two debtors had a right without the knowledge or consent of the plaintiffs, to create a new state of things, and then, by giving notice, to prevent the plain-

tiffs from doing what they lawfully might before, to create a right in themselves which, if observed, must derogate from the plaintiffs' right, and then to say that it is inequitable in the plaintiffs to act in derogation of this right so created. Surely the inequity begins earlier, and is in the defendants derogating from the plaintiffs' right without their consent."

This case appears to establish that even after notice of the arrangement made between the debtors that one should pay off all liabilities and become as between themselves a principal, the taking of a bill or giving time to the principal will not discharge the original co-debtor. A large portion of the claim against the defendant Redman was included in bills of Holt taken after full notice.

It is pointed out in the judgment that the foundation of the equity doctrine seems to be that a surety may at any time pay off the creditor, and in his name recover from the principal, and that in the case of two principal debtors this could not be, as such payment would discharge the whole.

I think the appeal should be allowed.

PATTERSON, J. A.—There are two questions for decision in this case. One relates to the application of payments made by Maguire to the plaintiffs; the contention, on the part of the defendant Hutton, being that those payments either have been applied by the plaintiffs, or that the law has applied them, in discharge of the debt for which he was liable, to an extent sufficient to pay off that debt. The other question is, whether assuming the debt not to have been paid off, the plaintiffs have so dealt with McGuire as to discharge Hutton.

McGuire and Hutton were partners in a mercantile business carried on in the village of Wingham. The plaintiffs are wholesale merchants in Hamilton, and were creditors of McGuire and Hutton.

In October, 1876, Hutton becoming dissatisfied with his partner's conduct of their affairs, a dissolution was arranged, and was carried out by a deed dated 14th October, 1876.

This was done after correspondence and consultation with the plaintiffs, and to some extent under their advice. At all events they were fully cognizant of the whole arrangement.

Hutton retired, and McGuire continued the business. McGuire assumed all the assets and liabilities and was to pay Hutton \$1,332; and he covenanted to discharge the debts and liabilities of the firm, and to indemnify Hutton against them.

McGuire continued to deal with the plaintiffs and incurred fresh debts to them.

The plaintiffs did not open a new account with McGuire in their ledger. They carried on the existing account, merely adding to the heading of it the words "James McGuire, 2nd November, 1876." At the beginning of the year 1877, when a new ledger was opened, the account was opened in the name of James McGuire, the balance of the former account was brought forward, and the amount continued without any distinction being observed between the old joint account and McGuire's separate account.

But while the two accounts were thus blended together in the plaintiffs' books, that circumstance was not communicated to the defendants. On the contrary, the statements of account rendered from time to time treated the accounts as distinct, although they were frequently contained on the same paper.

A considerable number of these statements are in evidence, and are before us, although only a selection from them has been printed in the appeal book. Some of the earlier ones are statements of the joint account only. There are six of these—three in November and December, 1876, and three in June and July, 1877. The six would be consecutive but for one in March, 1877, which referred to both accounts.

Besides these there are from forty to fifty statements, running on to November, 1879, all of which refer to both accounts, except, I think, three in September and October, 1877, which are special statements relating to the separate

account only. I believe I am correct in assuming, though I have not verified my idea by a very close examination of the accounts, that the absence of reference to the separate account in the six earlier statements is accounted for by the fact that, when those statements were made, nothing happened to be overdue on that account; a state of things which never existed after July, 1877.

The statements are of two kinds. One kind, which, as a rule, was rendered at or near the first of each month, shewed the balances due upon each account after crediting payments and adding interest, and in many cases, perhaps in most cases, crediting current promissory notes and acceptances. The other kind, which we find dated at all parts of the month, but most frequently about the middle of it, shewed merely the balances as brought down at the last monthly statement, without adding interest, but crediting payments received since the previous statement, and noting current securities held on account, including in most, if not in all cases, a promissory note sent with the statement for signature by McGuire. The object of these statements appears to have been to shew that the notes sent from time to time for signature did not exceed the amount uncovered by current paper.

I have two other things to remark respecting the accounts. I gather from the statements themselves, and from the evidence of Mr. Bell, that the system was to credit, as a matter of definite accounting, only cash payments, notwithstanding that the memorandum of current securities may sometimes have been made in the shape of a formal credit. Thus a draft or note which may be noted, or even in form credited, in one statement as current, disappears from the next statement if not paid at maturity. For example: In the statement of 2nd March, 1878, four securities are noted, one of them being a draft for \$250, due 11th March. In the statement of 13th March this draft disappears and the other three securities alone are noted. One of those three was a draft for \$200, due 9th April. The account of 1st of May contains a credit of \$100

paid on account of that draft and credited to the separate account, but there is no debit of the \$200 draft. This system of accounting must have been known to McGuire, to whom the statements were rendered. There was no communication with Hutton respecting the accounts.

The other remark I have to make is, that the promissory notes or acceptances given by McGuire from time to time were generally on account of the aggregate balance of the two accounts, that is to say, after July, 1877. Before that time they were on the old joint account. I refer to those notes which are shewn in the statements. There were others given by McGuire from time to time as he purchased goods, beginning on 3rd November, 1876, but these do not appear in the statements until he began to make default in his payments.

I say the notes, &c., were *generally* given on account of the aggregate balance, because there are two or three instances, shewn by the special statements to which I have alluded, in which he appears to have closed particular transactions by notes or acceptances on those special accounts.

In the ordinary mode of giving the notes, no distinction was made between the two accounts. I believe there is no instance amongst these aggregate statements of the two accounts in which the notes were given for the exact balance. They appear to have been nearly always *under* the gross amount, in two or three cases being taken for exactly \$100 short of it. I may have to speak more particularly of the way the notes were taken when I come to discuss the question of the discharge of Hutton. At present I merely wish to say that although the notes were often taken for irregular amounts, and nearly always for amounts which did not quite cover the debt, it is not in my opinion proper to call them accommodation notes. They are, in all the documents, said to be given or held *on account* of the debt. Take, for example, the statement of 8th November, 1878. After shewing the aggregate balance of \$3,480.08, it continues thus :

"Promissory notes to account, \$3,145.67.

"Nov. 1. By draft at thirty days, \$150.

"Dear Sir.—Please accept our draft on you for \$150 on account of overdue balance. * * The premiums paid out for insurance, \$70, please refund by special remittance."

I have been particular in thus referring to the character of the statements rendered, because a great deal of the argument before us on the question of the application of payments was based upon the analysis of the accounts.

I do not think it can be fairly said that the plaintiffs actually appropriated to the old account any payments beyond those for which the arbitrator has given credit to the defendants. On the contrary, I take the fair result of the documents to be that, so far as any action of the plaintiffs is concerned, the other payments have been appropriated to the new account. I do not think that anything turns on the difference between the two classes of statements which were rendered. If I am correct in understanding that nothing is definitely credited but what is paid in money, and that the memoranda respecting current notes, whether in the form of credits or in the form of mere memoranda, were neither meant by the plaintiffs nor understood by McGuire to be anything but memoranda, there is no room for the contention that any of the payments for which Hutton now claims credit were applied or intended to be applied by either the plaintiffs or McGuire on the old account.

If the defendant Hutton can maintain the right he claims to have them so applied, it must be because the account of the old firm and the new account with McGuire were blended so as to form but one account, and not kept distinct as two separate debts. If the debts were kept distinct the plaintiffs would clearly be entitled to apply general payments to whichever account they pleased. But if they were blended into one account, the rule acted upon in *Hooper v. Keay*, L. R. 1 Q. B. D. 178, and other cases cited at the Bar following Clayton's case, 1 Mer. 172, will

apply, and the payments will be appropriated by law to the items of account in the order of their date. In the Court below Mr. Justice Cameron considered that a blending of the two accounts had taken place, and he rested that opinion upon grounds the force of which I feel. The union of the two accounts in the plaintiffs' books is a strong circumstance, but as it was not made known to the defendants it cannot be regarded as conclusive. In *Hooper v. Keay Blackburn, J.*, said: "Had this account been only in the plaintiffs' ledger it would not have bound them; but they sent the copy to Keay." In this case no copy of the ledger account was sent, but in every account rendered the two debts were treated as distinct. The general statement of securities held on the gross amount due by McGuire cannot, for the reasons I have already given, be taken to neutralize the assertion which the same paper always contained, and which McGuire must have always assented to, that the plaintiffs regarded the two debts as retaining their separate existence. Therefore I cannot see my way to hold that the defendant Hutton has accomplished the task, the onus of which was upon him, of shewing that there was such a blending of the accounts as to bring the case in this respect within the rule acted upon in *Hooper v. Keay*.

But Hutton contends that, although he and McGuire were, at the time of the dissolution of their partnership, jointly liable as principal debtors for the balance then due, yet after that date they were principal and surety; and that the plaintiffs, by giving time to McGuire the principal debtor, have discharged Hutton the surety.

That such a change of relationship may, even at common law, take place, seems so evident that one would scarcely expect to find an express decision on the point. There is, however, a case of *Rogers v. Maw*, 4 D. & L. 66, in which, referring to circumstances not unlike those before us, but where the continuing partners had not covenanted in express terms with the outgoing partner to pay the debts, Pollock, C. B., remarked: "We have no doubt that the agreement of the two plaintiffs to take all the debts on

themselves, and to release the defendant from his liability as to the joint concern, amounted to a covenant to pay the debts, and that as between the plaintiffs and the defendant the defendant became surety only." See also *Musson v. May*, 3 Ves. & B. 194, where the plaintiff and the intestate who had been his partner had become as between themselves surety and principal, although the plaintiff remained legally liable to the creditor. That the new relation was in fact constituted is conclusively shewn by the deed of dissolution.

The plaintiffs did not agree to release Hutton and accept McGuire as their sole debtor. They were, however, fully acquainted with all the arrangements between the parties, the plaintiff Bell, if I apprehend the evidence correctly, having taken an active part in bringing them about. After the dissolution, I think they must be held to have recognized the fact that McGuire had become principal debtor and Hutton his surety, and to have sometimes dealt with them on that footing, notwithstanding that on one or two occasions they asserted the contrary.

Let us glance at the correspondence which is in evidence in connection with what can be gathered from the accounts :

On 3rd November, 1876, we find the following letter from the plaintiffs :

HAMILTON, 3rd November, 1876.

Messrs. MCGUIRE & HUTTON.

To THOMPSON, BIRKETT & BELL.

1876.

Nov. 4.	To note due to day.	\$314 71	
" 4.	To " " "	387 49	
			\$702 20
	Add interest on \$314.71 to 20th Dec.	3 94	
	" " \$387.49 to 20th Jan.	8 14	
			12 08
			\$714 28
Nov. 4.	By draft due 20th December...	319 45	
	By " 20th January. ...	397 85	
			\$717 30

Less Bank Agency.	0	80	
“ “	1	98	
Stamps	0	24	\$3 02
			<hr/> \$714 28

Dear Sirs,—As arranged when Mr. McGuire was here, we pass our drafts on you to cover notes due to-morrow as shewn in statement above.

Please accept when presented and oblige, dear Sir,

Yours truly T. B. & B.

The drafts must have been accepted by McGuire, for we find them credited under date 30th November, in the ledger account. McGuire paid the one for \$319.45. The other was retired by the plaintiffs and again debited in the ledger account. So far the old firm was treated as still in existence.

Soon after this the plaintiffs appear to have drawn up a letter for Hutton to sign, agreeing to continue his responsibility upon renewals of the paper of McGuire & Hutton; but he would not sign the document. His refusal produced the following letter from the plaintiffs:

HAMILTON, ONT., 16th November, 1876.

Mr. William Hutton, Wingham.

DEAR SIR,—Mr. McGuire informs us that you refuse to sign the letter which we drew up for you, by which you agreed to continue your responsibility upon any renewals we might have to give of the existing paper of McGuire & Hutton. We cannot see what you are to gain by this. You are responsible of course upon the existing paper, and if we cannot get renewal of it, then we must proceed to collect. We have nothing to do with the arrangements that may exist between McGuire and yourself. We can proceed against either or both of you, so long as we hold the firm's signature for a dollar of indebtedness, *and we shall do it*, if you persist in your present course. We think you had better take advice in this matter. We are asking nothing unreasonable, but what, on the contrary, is to your interest as well as ours, if you look at it carefully. In any case let us know your final decision.

We are, dear sir, yours truly,

THOMSON, BIRKETT & BELL.

Then we have a draft document dated 22nd November, 1876, which possibly may be the "letter" referred to by the plaintiffs in their letter of the 16th. At all events it seems similar in its import. It is in the following terms:

"WINGHAM, 22nd November, 1876.

"*Messrs. Thompson, Birkett & Bell, Hamilton.*

"Dear Sirs,—With reference to the indebtedness of my late firm of McGuire & Hutton to your firm, amounting at this date to \$1,518.86, say fifteen hundred and eighteen dollars and eighty-six cents, and comprised in the following promissory notes and acceptances, viz:

(*Then shewing items amounting to \$1,518.86.*)

"I hereby promise and agree to sign renewal notes or accept renewal drafts along with my late partner, James McGuire, for extending the time upon all or any of the above promissory notes or acceptances or drafts, reserving to myself the right to decline to sign further renewals after the existing overdue amount has been renewed up to the 25th day of February, A. D., 1877, and the note coming due on 22nd March next, and the open account have been renewed up to the 25th day of June, 1877.

"Dated at Wingham this 22nd day of November, A. D. 1876, one thousand eight hundred and seventy-six."

To this Hutton replied, by post card, as follows:

"*Messrs. Birkett & Bell,*

"Gentlemen,—My legal adviser tells me it will not be for my benefit or interest to sign the document left by you, and you remember the Jew's quotation in my last letter to yourselves, 'If in, get out; out, keep out.' I think I will have that framed. Mr. McGuire agreed to collect all debts and pay all—and I am quite willing to let him do it.

"Yours respectfully, WILLIAM HUTTON, Miller."

The "last letter to yourselves" referred to was written on 13th October, before the dissolution.

After receiving the card, the plaintiffs wrote the two letters following, one to each of the late partners:

"HAMILTON, 24th November, 1876.

"*Mr. James McGuire, Wingham.*

"DEAR SIR,—Mr. Hutton sends us a postal card saying his legal adviser tells him not to sign the paper which the writer left with him.

"In these circumstances *we can give you no renewals of the old firm's paper*, and must ask you to make special efforts to have it paid up. We should specially like to see those drafts which we have drawn upon the old firm, due 20th December and 20th January, taken out of the way. Do not hesitate to tell Mr. Hutton that you cannot pay him on 1st December, if it is going to cramp you to find him the money, and let him wait until it is convenient for you to pay.

"Keep your old indebtedness (that is, the indebtedness of the old firm) separate from your new liabilities, (and for this purpose you should get a new ledger), and then when you remit on old indebtedness say so.

"We hope the matter of insurance has been attended to.

"Yours truly, THOMSON, BIRKETT & BELL."

"HAMILTON, ONT., 25th November, 1876.

"Mr. Wm. Hutton, Wingham.

"Dear Sir,—We have your postal card of 23rd inst., and regret that you should decline to carry out that which you tacitly admitted to the writer was a fair and reasonable proposal. In the circumstances we must refer you to see *that Mr. McGuire remits us promptly for payment of the late firm's overdue paper*, otherwise we shall have to put you both to trouble and expense. We presume as you are not disposed to accommodate us, you will not expect any accommodation from us. And we beg, therefore, to advise you that unless you and Mr. McGuire (either or both of you) send us our money very quickly, you may postpone the framing of the Jew's quotation meantime, for you will find you are *in* for it, and not *out* by any means.

"THOMSON, BIRKETT & BELL."

Hutton's answer to this was as follows:

"WINGHAM, 1st December, 1876.

"Messrs. Thomson, Birkett & Bell.—

"Gentlemen,—Your favour in reply to my postal card I have received, and in reply have been to see Mr. McGuire anent the matter.

"In our bargain at the dissolution he assumed all debts and was to pay me my claims in 3, 6, 9, 12 months, and agreed in writing to give or transfer me a policy of insurance for \$2,000, which I was to hold until my claims were paid. Now I do not wish to defraud you one cent or get clear of any debt I honestly owe. You are entitled

to your money and I believe there is plenty to pay not only yours but mine as well, taking your figures for it in the statement you shewed me. Now this is what I am willing to do, and I told Mr. McGuire for him to give me the policy of insurance as he agreed to do, and whenever he does that I will *endorse the old paper* which you hold against McGuire & Hutton as shewn in your statement.

"I consider Mr. McGuire has not dealt honourably with me in the past, and that is a more charitable expression than the one I could use; and a man who deceives me once I blame, but if he does it a second time I blame myself. If he fails to carry out his agreement with me, then the sooner it comes to a focus the better.

"Yours respectfully,

"WILLIAM HUTTON."

In this correspondence we have a very distinct assertion by the plaintiffs of what was, notwithstanding the arrangements between their debtors, their undoubted right, viz., the right to treat them both as equally liable for the debt; and we have as distinct a threat to enforce that liability, if Hutton would not become a party to renewed paper. We have at the same time the recognition of the fact that, as between McGuire and Hutton, the latter was only surety for the former, who had all the assets out of which the debt was to be paid; and we have Hutton's refusal to be a party to any renewal, except as indorsing McGuire's paper, which he consents to do on receiving the security he mentions.

The next letters are important. There is one dated 6th December, 1876, from the plaintiffs to Hutton, in answer to his of the first:

"HAMILTON, 6th December, 1876.

"*Mr. Wm. Hutton, Wingham.*

"Dear Sir,—We have your letter of 1st instant, and on consideration have advised Mr. McGuire to agree to your proposal, and have an endorsement made on his policy of Insurance to the effect that "loss if any shall be payable to you to the extent of your claim against him."

"This should be sufficient for your purpose, for we suppose you only want the amount of your claim, which is not

\$2,000 now, and we hope will be gradually getting less, as he is able to make payments on it.

"We have sent Mr. McGuire some renewal paper, which kindly sign, after the insurance matter is made right

"We are, dear Sir, yours truly,

"THOMSON, BIRKETT & BELL."

The renewal paper here mentioned, and the character in which Hutton was asked to sign it, as well as its fate, are explained by an entry in the statement of 6th December, 1876, furnished to McGuire. That statement shews, on the debit side, \$236 due for the balance of a draft for \$316 which matured on 10th November; \$128.99 for a note due on 25th November, and \$8.75 for interest, &c., making in all \$373.74; against which there is this credit: "December 6. By p.-note due 7th February, inclosed for signature and indorsation of William Hutton, but never completed, \$373.74."

There are other letters, particularly one to Hutton of 4th January, 1877, and one to McGuire of 19th January, 1877, in which the plaintiffs still speak of *indorsements* by Hutton, which indorsements, however, he never gave.

Besides these references to indorsements, which seem to me to be very decided recognitions of the relationship between the defendants, there was the fact that the plaintiffs by continuing to supply McGuire with goods upon credit, and by applying on McGuire's new account whatever moneys were paid generally by McGuire, were making the old stock, and in effect making Hutton himself, security to themselves in respect of their new dealings with McGuire. It may, of course, be said that the new stock in its turn became security for the payment of the old debt; but even if under all the circumstances that could be, in any substantial sense, conceded, the fact to which I have just alluded would remain.

Then this being the relationship of the parties, let us see, before considering the law on the subject, what was done by the plaintiffs by way of giving time to McGuire.

I have already referred to two drafts drawn on McGuire

& Hutton on 4th November, 1876, one due on 20th December, 1876, and one on 20th January, 1877, and which must have been accepted by McGuire. I do not place stress upon these because we have no direct evidence that at the time these drafts were drawn the plaintiffs were informed that Hutton objected to be a party to renewals of the paper.

But at the end of November or the first of December, the attitude of the parties was defined. Hutton refused to be a party to renewals, the plaintiffs threatened to press the overdue paper, and Hutton declared that "the sooner it came to a focus the better." Then ensue some attempts to get Hutton to indorse renewal paper; but, as shewn by the statement of 6th December, 1876, those attempts failed.

From that date forward the dealings are with McGuire alone. A reference to a few of these will make it clear that time was constantly extended to him, by taking his promissory notes or acceptances for the payment of the old debt as well as his new engagements.

Up to July, 1877, as I have already remarked, the old account was kept more distinct from the new one than at the later dates.

In the statement of 12th June the balance of it is stated as \$1,100.31, which should have been \$1,090.31, there being an error of \$10 in subtracting a credit, which was corrected later on. Against this balance there are three credits of current paper, viz.: a draft of \$225, drawn 12th June, at thirty days; a renewal note for \$527, due 8th July; and one for \$300, due 19th July; in all \$1052, leaving only \$38.30, besides interest, uncovered. Then, on 9th July, the \$527 note having fallen due and having been, as I assume, retired by the plaintiffs, they render another statement, beginning with the same balance of \$1,100.31, crediting the \$225 draft which was still current, and noting, as held on account, the note for \$300, and another note accompanying that statement for \$472. And they write: "Dear Sir, We trust you will be ready with your money on this day week for draft due at Wingham on that

day. We enclose further renewal on account of overdue amount, which please sign and return." The \$472 was signed and returned, and is shewn by statement of 20th July as held to account of the old balance. It appears again in a statement of 3rd August. That document states the balance as \$1,101.05 ; credits a draft for \$200, due 25th August, and mentions as held to account of the sum due the \$472 note, and another, due 7th November, for \$434.15, making \$1,106 15, which covers the whole amount due and something more, probably interest.

On 29th October, 1877, the balance shewn, including interest to 1st November, is \$929.61, on account of which it is noted are held the \$434.15 note and another then sent for \$429.61. I think this is the last note which appears to have been taken from McGuire specially on account of the old account. The subsequent statements, while they usually carry forward the old balance with accumulated interest, as something separate from the new account, yet shew that paper was taken and renewed from time to time on account of the gross amount of the two accounts, although the payments made were credited on the new account alone.

The fact of the systematic extension of time to McGuire is, in my judgment, very conclusively made out ; and I think it is equally clear that, under the settled doctrines of equity, it was a dealing with the principal which, in ordinary circumstances, would discharge the surety.

I am unable to satisfy myself that the rule is not applicable to the circumstances before us ; but, as that result is very strongly questioned, I shall try to explain the grounds of my opinion.

It is important, at the start, to recall to mind the principle on which the general doctrine is founded. I do not think it is anywhere more clearly or satisfactorily stated than in the following passage which I read from the judgment of Lord Hatherley in *Oriental Financial Corporation v. Overend, Gurney & Co.*, L. R. 7 Chy. 142, 149. "Now the real question is, whether this case falls within the author-

ities by which it has long been settled that, if time is given to the principal, the surety is discharged. It was suggested, and the learned Vice-Chancellor seems to have given some weight to the suggestion, that the basis on which this principle rests has never been fully understood, and that it would have been better had the Court *ab initio* decided, not that the surety should be absolutely released, but that he should be put to prove his injury, and be allowed damages for any injury he might have sustained, and that therefore the authorities which have proceeded upon this principle are in no way to be extended. I do not feel myself at liberty to comment upon the propriety or impropriety of a principle which more than half a century ago was stated by Lord Eldon, in *Samuel v. Howarth*, 3 Mer. 272, to have been long established, and which has been continually acted upon since that time, and is as well settled and established as any principle of the Courts of Equity. I think that sometimes the cases are a little open to this observation, that they do not all of them, especially the later cases, clearly and distinctly shew in what way the principle is established and brought to bear. But, undoubtedly, if we look to the earlier cases, amongst which I might cite especially *Oakeley v Pasheller*, 10 Bligh. 548, the principle is laid down very clearly, that if you agree with the principal to give him time, it is contrary to that agreement that you should sue the surety; because, if you sue the surety, you immediately turn him upon the principal, and therefore your act breaks the agreement into which you have entered with the principal. It is not simply neglecting to sue the principal which would have any effect upon the surety; but there must be a positive agreement with the principal that the creditor will postpone the suing of him to a subsequent period. To shew that this is the principle we have only to refer to another class of cases, which, down to one very late case, clearly and distinctly established that it is competent to the creditors to reserve all their rights against the surety, in which case the surety is not discharged; and for this reason—that the

contract made with the principal is then preserved, because the creditors have engaged with the principal not to sue him for a given time, but subject to the proviso that the creditors shall be at liberty to sue the surety, and so turn the surety upon the principal without any breach of the engagement with the principal. I say that this doctrine has always been recognized down to a late period, because Lord Truro threw some doubts upon it in the case of *Owen v. Homan*, 3 Mac. & G. 378. But Lord Cranworth, in giving judgment in that case upon appeal to the House of Lords, 4 H. L. C. 997, said there could be no doubt about the case before the House, and that he did not think he should have entered into any discussion of the case had it not been for the doubt thrown by Lord Truro upon the principle that you might retain the surety, if that formed part of the original contract as to not suing the principal; and Lord Cranworth said that he thought it right to protest against the doubt, because he thought the doctrine was perfectly clear and established."

Then we find it decided that, in order to give the surety the benefit of the rule, it is not necessary that the creditor should have, at the time of the contract, been aware that he was surety or have dealt with the parties on that footing. It is enough if, before he makes the agreement to give time to the principal, he is informed of the relation of the parties to each other. This is true, even if that relation is the reverse of that which appeared to exist when the contract was made; as if the creditor is informed that the party who appeared to be principal had all the time been surety, and the party who appeared to be surety had really been the principal debtor. This was what happened in *Oriental Financial Corporation v. Overend, Gurney & Co.* L. R. 7 Chy. 142; 7 H. L. 348.

Neither will the surety lose the protection of the rule in consequence of his being a joint contractor, and by the form of his contract jointly liable with the principal, as was the case in *Pooley v. Harradine*, 7 E. & B. 431; and *Greenough v. McLelland*, 2 E. & E. 424.

These doctrines appear to me to apply to the present case, notwithstanding the feature which is dwelt upon as distinguishing it from cases like those to which I have adverted, viz., the circumstance that the parties were originally co-debtors, and only became principal and surety after the debt to the plaintiffs was contracted.

It is said that the rights of the plaintiffs under the contract cannot be changed by arrangements between the debtors to which the creditors were not parties. But setting aside for the moment what I take to be the fact, that these plaintiffs were privy and assenting parties to the change, I do not perceive any force in the objection which would not have attached to it in the cases I have just cited.

The contract is, no doubt, interfered with, and the creditor's right under it abridged, if, on being told that the person with whom he contracted as principal is really a surety, and that the one whom he supposed was surety is the principal, or that one of two with whom he dealt as joint debtors, equally liable to him as principals, is only a surety for the other, he is obliged to recognize that relationship in his subsequent dealings. What I do not understand is what difference it can make to the creditor who has to submit to the variation of his contract, whether the relationship of principal and surety existed between the debtors all the time, or was only created shortly before notice of it is given to him.

Bailey v. Griffith, 40 U. C. R. 418, was a case in which the relationship of principal and surety was the result of a change made after the debt there in question was contracted, by which the original principal became the surety, and the original surety the principal debtor. It was decided by the present Chief Justice of the Common Pleas at *nisi prius*, and afterwards by the Court of Queen's Bench, in accordance with the views I have been putting forward; some stress also being placed on the fact, which I take also to exist here, that the creditors had assented to the change of relationship.

The case relied on as decisive against the application of the general rule to the present case is *Swire v. Redman*, L. R. 1 Q. B. D. 536, a decision of Cockburn, C. J., and Blackburn, J. The judgment, which was read and concurred in by the Chief Justice, was prepared by Blackburn, J.; and it is needless to say that every opinion of that very eminent Judge is entitled to the greatest respect, and that, if comparison is permissible, this is especially true of his judgments on questions of mercantile law.

We have, however, to be guided by the reasoning upon which the opinion is founded, and not by the mere authority of the decision. I cannot say that I am convinced by anything said in *Swire v. Redman* that the opinion to which I have been led by the other authorities is incorrect.

The whole of the reasoning on which the judgment proceeds is found upon pages 541 and 542 of the report. I shall have to quote it for the purpose of pointing out some particulars in which it seems to me unsatisfactory.

The first observation I have to notice reads thus: "We think it clear law that a creditor, who has two principal debtors, may bind himself to one of them (in any way short of an absolute release) to give him time, or even not to sue him, without in the least prejudicing his right of recourse against the other. By suing that other debtor, a recovery from him entitles him to recover contribution from his co-debtor, and consequently the creditor may, by his suit against the one debtor, bring about such a state of things as renders him, the creditor, liable to an action by the co-debtor who has been forced to make contribution, when by the bargain between the creditor and himself he ought not to have been; but this forms no defence for the other debtor. The law says that the party injured shall have compensation in damages adequate to the injury he has received, but that this shall form no defence to the party who has received no injury at all. And if no damage at all has been received there is no compensation due to anyone. And this, we cannot but think, is consistent with sound sense and clear justice."

I have never read this passage without regretting that something more had not been said to indicate more precisely the principles of practice or pleading to which allusion is made.

I understand the reference to be to common law doctrines. The ordinary right of one who contracts jointly and not severally is to be sued jointly with his co-contractor, provided the latter is within the jurisdiction and not protected by some disability or statutory discharge. This right would, under the older practice, have been asserted by plea in abatement, or if the joint contract were shewn by the declaration, by demurrer or motion in arrest of judgment. If the creditor had disabled himself from suing one of his joint debtors, as by a release, or by having recovered judgment against him, he could not maintain an action against the other : *King v. Hoare*, 13 M. & W. 494. Therefore I do not suppose the language used, wide as its terms are, to be intended to assert that one joint contractor could be sued alone.

It is true, however, that if the creditor sued both in the one action, the agreement he had made to give time might not be pleadable in bar, and the only remedy at law upon it might be by action for damages ; and so, notwithstanding such an agreement, the right of action might not, at law, have been suspended : *Thimbleby v. Barron*, 3 M. & W. 210. But this would be equally the case where the principal and the surety were not in form joint contractors, as in the case of the drawer and acceptor of a bill, or of an ordinary guaranty : *Durand v. Stevenson*, 5 U. C. R. 336.

The discharge of the surety does not depend, as I understand the rule, upon the agreement to give time being one which could be pleaded at law as a bar to an action for the debt ; but merely upon the agreement being one which is binding upon the creditor. The cases last cited and the rule as explained by Lord Hatherley in the case in L. R. 7 Chy., are authority for this. I may also refer by way of illustration to *Heath v. Key*, 1 Y. & J. 484, and the reporters' notes to that case, and to the class of cases which

deal with the distinction between releases and covenants not to sue, of which *Ford v. Beach*, 11 Q. B. 852; *Price v. Barker*, 4 E. & B. 760, and *Willis v. DeCastro*, 11 C. B. N. S. 216, may be taken as examples.

These remarks, I am quite aware, may seem scarcely called for by the observations on which I am commenting, which may have been intended only to lead up to the proposition which immediately follows them, and which is not open to cavil. My object is to point out that, as well in this portion of the judgment as in that to which I am coming, I find difficulty in following the reasoning or in accepting it as convincing.

The proposition I refer to follows in these words: "And, therefore, *so long as the plaintiffs had no notice* that the relation between Redman and Holt had been changed from that of joint principal debtors to something else, the plaintiffs might bind themselves to Holt in any way they pleased to give him time without thereby affecting in any way their remedy against Redman the co-debtor; and this we apprehend is clear, not merely in justice and sense, but on all decisions both at law and equity."

The judgment then proceeds thus: "But where the two who became liable for a debt are not joint principal debtors, but from the beginning one of them is a principal and the other a surety, the case is different. The relation of principal and surety gives to the surety certain rights. Amongst others the surety has a right at any time to apply to the creditor and pay him off, and then (on giving proper indemnity for costs) to sue the principal in the creditor's name. We are not aware of any instance in which a surety ever in practice exercised this right; certainly the cases in which a surety uses it must be very rare. Still the surety has this right. And if the creditor binds himself not to sue the principal debtor, for however short a time, he does interfere with the surety's theoretical right to sue in his name during such period. * * This rule, whether it was originally right or not, is no doubt well established. But when, as in the present case, the two debtors are both

principals, there is no such right. Redman never could have paid off the plaintiffs and sued Holt in their name, for by the very act of paying off the plaintiffs the cause of action in their name would be gone, and the right which Redman would have had to sue Holt for contribution would be in no way affected by any bargain which the plaintiffs had made with Holt alone to give him further time. The contention is, that the two, Redman and Holt, had a right, without the knowledge or consent of the plaintiffs, to create a new state of things, and then, by giving notice, to prevent the plaintiffs from doing what they lawfully might before—to create a right in themselves which, if observed, must derogate from the plaintiffs' right, and then to say that it is inequitable in the plaintiffs to act in derogation of this right so created. Surely the iniquity begins earlier, and is in the defendants derogating from the plaintiffs' right without their consent."

I cannot help thinking that this reasoning is fallacious, or that it proceeds upon questionable premises. I say nothing just now of the distinction which exists between *Swire v. Redman* and the case before us, in the fact that the new state of things was not created here without the knowledge and consent of the plaintiffs.

The continued existence of a debt for which the surety, after paying off the creditor, could sue the principal in the name of the creditor, does not strike me as at all a satisfactory test. I do not find it easy to imagine a case in which a money debt was the subject of the guaranty, and in which the surety who paid it would require to sue in the name of the creditor, or indeed in which a right of action would remain in the creditor. In the case of negotiable instruments, the surety who paid the debt would ordinarily have an action in his own name upon the instrument itself. In most other cases he would sue for money paid to the use of his principal.

My impression is, that if Lord Hatherley's exposition of the doctrine had been accepted as explaining the true ground on which it rested, instead of the somewhat different prin-

ciple enunciated in *Swire v. Redman*, it would have been found that much of the ground work of the judgment had disappeared.

I may also repeat that I see no reason why we should treat the time at which the relation of principal and surety arises as a necessary factor in the problem of the position of the creditor who, having dealt with his debtor as a principal, or with two as joint principals, finds himself afterwards compelled to accord to the supposed principal the rights of a surety. In my view the result to the creditor is the same, whether the status of surety existed from the first, or was created at a later period. I think this is consistent with the principle acted upon in *Oakeley v. Pasheller*, 4 Cl. & F. 207; *Overend, Gurney & Co. v. Oriental Financial Corporation*, L. R. 7 H. L. 348, and the other cases to which I have referred, excepting *Swire v. Redman*. For the reasons I have given that case ought not, in my opinion, to govern the one before us, even if the present circumstances resembled those in view of which it was decided. But having regard to the important distinction between the facts of the one case and the other, I appeal to *Swire v. Redman*, as well as to the other cases as an authority for the conclusion I have adopted. That distinction is found in the connection which the plaintiffs had with the affairs of the defendants; the active part they took in bringing about the arrangement by which McGuire took all the assets out of which the debts were to be paid, and undertook to pay the debts, and Hutton, while not released from his original liability, assumed with relation to McGuire the position of surety only; and the subsequent recognition by the plaintiffs in their dealings and correspondence of that change of relationship.

When, therefore, Mr. Justice Blackburn, stated the contention upon which he was adjudicating to be that the two, Redman and Holt, had a right, *without the knowledge or consent of the plaintiff*, to create a new state of things, and then, by giving notice, to prevent the plaintiffs from doing what they lawfully might before, he included the fact,

which was a most material one in the judgment he gave, and which in my view of this case is entirely wanting, viz, the absence of the knowledge and consent of the plaintiffs. Eliminate that fact from *Swire v. Redman*, and it ceases to have a semblance of authority for the present plaintiffs, but on the contrary may take its place with those which aid the defence.

I ought not to close my remarks, although they have already run to an unreasonable length, without noticing the case of *Duncan, Fox & Co. v. North & South Wales Bank*, L. R. 6 App. 1. The point for decision in that case was the right of an indorser to the benefit of securities deposited by the acceptor of a bill with the holder. It was held that he was so entitled whether at the time of his indorsement he knew or did not know of the deposit of the securities, and that the surety's right in this respect in no way depends on contract, but is the result of the equity of indemnification attendant on the suretyship. Lord Selborne remarked that in examining the principles and authorities applicable to the question it seemed to him to be important to distinguish between three kinds of cases: (1) Those in which there is an agreement to constitute, for a particular purpose, the relation of principal and surety, to which agreement the creditor thereby secured is a party; (2) Those in which there is a similar agreement between the principal and surety only, to which the creditor is a stranger; and (3) Those in which, without any such contract of suretyship, there is a primary and secondary liability of two persons for one and the same debt, the debt being, as between the two, that of one of those persons only, and not equally of both, so that the other, if he should be compelled to pay it, would be entitled to reimbursement from the person by whom (as between the two) it ought to have been paid. It was to the first of these classes of cases, and to that class only, that he conceived the doctrines laid down in such authorities as *Owen v. Homan*, 3 Mac. & G. 378; *Newton v. Chorlton*, 10 Hare 646, and *Pearl v. Deacon*, 20 Beav. 186, 1 DeG. & J. 461, applied to their

full extent. After some observations in illustration of this proposition he went on to remark that it was consistent with what he had said that the person who, as between himself and another debtor, is in fact a surety (though the creditor is no party to the contract of suretyship,) has against that other debtor the rights of a surety; and that the creditor receiving notice of his claim to those rights will not be at liberty to do anything to their prejudice, or to refuse (when all his own just claims are satisfied) to give effect to them. And he then referred to three cases, one of which was *Overend, Gurney & Co. v. Oriental Financial Corporation*, as being founded, as he understood them, on this view of the law.

I do not cite these observations as adding anything to what is deducible from the other cases in illustration of the law as applicable to the facts with which we are dealing. I refer to them chiefly as another statement by an eminent Judge of the duty of the creditor to respect the rights of the surety when informed that one of two debtors, with both of whom he dealt as principals, is in fact a surety for the other, without any suggestion that the stage of the transaction at which the relationship of principal and surety arose is at all material to the obligation. *Swire v. Redman*, which had been decided three or four years before, was not referred to; and Lord Blackburn, who also delivered a judgment, confined his remarks to the point immediately before the House, and said nothing upon the general doctrine.

In my opinion we ought to affirm the judgment of the Court below, upon the ground that Hutton has been discharged by the plaintiffs' dealings with McGuire.

MORRISON, J. A., concurred in the views expressed by HAGARTY, C. J., and BURTON, J. A. Therefore :

Per Curiam. Appeal allowed, with costs [PATTERSON, J. A., dissenting.]

DAVIDSON V. MAGUIRE.

Fraudulent conveyance—Insolvent Act—Marriage.

In November, 1876, a marriage being contemplated between the defendant and M., the defendant's father proposed that M. should erect a house, which he intended building, on a lot belonging to the father, who agreed to convey the same to his daughter as a marriage portion. This M. assented to, and in that month the marriage took place. During the year following M. built the house, and his father-in-law conveyed the lot to the defendant as had been previously agreed upon. In January, 1880, M. became insolvent, and proceedings were taken by his assignee to have the transaction declared fraudulent as against creditors, under the 132nd section of the Insolvent Act, 1875; or under the 13th Elizabeth, ch. 5.

Held, [affirming the decree of Proudfoot, V. C., reported 27 Gr. 483.] that no fraudulent intention was shewn on the part of M., and any knowledge by the defendant or her father was distinctly negatived by the evidence, and therefore the transaction could not be impeached under either statute.

Jackson v. Bowman, 14 Gr. 156, remarked upon, distinguished and approved of.

This was an appeal by the plaintiff, from a decree of the Court of Chancery pronounced by Proudfoot, V. C., as reported 27 Gr. 483, where the facts giving rise to the suit are fully stated.

The appeal came on to be heard on the 22nd of December, 1880,* and again, in consequence of the retirement from the bench of Vice-Chancellor Blake, before judgment, on the 13th of September, 1881.†

Bruce, for the appellant.

Bethune, Q. C., for the respondent.

The points relied on and cases cited appear in the report of the case in the Court below, and in the judgment of this Court.

March 24, 1882. SPRAGGE, C. J.—The transaction in question in this case is impeached on two grounds. The first is that it is void under the Insolvency Act, sec. 132, (1875). That point is disposed of so clearly and forcibly in the judgment of the learned Vice-Chancellor, 27 Gr. 483, that I do not see that anything can usefully be added to what he has said.

* *Present*—BURTON, PATTERSON, and MORRISON, JJ. A., and BLAKE, V. C.

† *Present*—SPRAGGE, C. J., BURTON, PATTERSON, and MORRISON, JJ. A.

The transaction is impeached secondly as void under the Statute of Elizabeth, and such relief is sought as was given to creditors in the case of *Jackson v. Bowman*. 14 Gr. 156. If in this case there had been no consideration for the erection of the house by the husband, I should have considered the moneys expended by the husband upon its erection a voluntary settlement by the husband upon his wife, which in his then actual circumstances he was not warranted in making.

This case differs from *Jackson v. Bowman*, in there being in this case a valuable consideration moving from the father of Maguire's wife, which brings this within the class of cases upon which the learned Judge has rested his decision. The rule is stated succinctly by Lord Hardwicke in *Brown v. Jones*, 1 Atk. 190. "It is admitted if a settlement is made before marriage, though without a portion, it would be good; for marriage itself is a consideration; and it is equally good if made after marriage, provided it be upon payment of money as a portion, or a new additional sum of money, or even an agreement to pay money, if the money be afterwards paid pursuant to the agreement; this is allowed both in law and equity to be sufficient to make it a good and valuable settlement."

I have looked at the several cases cited by the learned Vice-Chancellor in his judgment, and they appear to me to support the positions for which he cites them. There is another case which is apposite to the one before us: *Ex parte Draycott and wife*, in the matter of *Archer*, 2 G. & J. 283. There was a post nuptial settlement to which Archer, the bankrupt, and Draycott were parties. Draycott's wife was the daughter of Archer. Draycott covenanted with Archer that he would, in a certain event, pay to his wife an annuity of £50 a year. This covenant was expressed to be in consideration of a covenant by Archer to Draycott to pay £50 a year to his daughter, Draycott's wife; and the instrument contained such covenant, with certain provisions not material to the point in question. Archer became bankrupt, and Draycott applied to prove under the com-

mission for the value of the annuity, upwards of £700. Sir Lancelot Shadwell held the covenant by Draycott to be a sufficient consideration for the covenant by the bankrupt. Put the agreement by the father, in the case before us, to convey a certain parcel of land to his daughter upon a house being built upon it by his daughter's husband, and the erection of the house, for the covenant by the father in the case cited to pay an annuity to his daughter in consideration of the covenant by the husband, and put the building of the house in this case, in consideration of the father's agreement, in the place of the covenant in the case cited by the son-in-law, and the cases are in principle parallel. In each case there was a post-nuptial settlement, the wife in each being the beneficiary, and entitled to the benefit from whichever quarter it might be derived; the only questions being, was it for valuable consideration, and was it *bond fide*. Upon both these points I agree in what is said in the judgment of the learned Vice-Chancellor.

Mr. Bruce, for the appeal, contends that the building of the house by the son-in-law was not the consideration for the conveyance by the father; but I think it certainly was. It was named and put as the consideration, and it makes no difference that but for the agreement between them he would still have built, but have built elsewhere.

The learned counsel also contends, that the agreement by the father to convey was not an agreement that would be enforced; for this reason, among others, that it was too indefinite, the description of the house not being settled in the agreement. But the question is not whether an agreement still *in fieri* will be enforced, but whether an agreement which has been carried out on both sides, each party having accepted the performance of it by the other, can be impeached on the ground that when *in fieri* one party could not have enforced its performance against the other. But I by no means concede that specific performance could not, after the building of the house, have been enforced

against the father. I incline to think that it could. *Mc-Intosh v. The Great Western R. W. Co.*, referred to in *Waring v. The Manchester R. W. Co.*, 7 Hare 482, both of which cases are referred to in *Jackson v. Jessup*, 5 Gr. 534, are authorities in favour of the affirmative of the proposition. But that after all is not really the point. The real point is, whether the building of the house by Maguire upon the land agreed to be conveyed, and after the building actually conveyed by his wife's father, was for a valuable consideration. In my opinion it was.

It was necessary also that it should be *bond fide*. If a mere contrivance to endow the wife at the expense of creditors, it would have the taint of fraud, and could not be supported. Such a case should be narrowly examined, and if collusion or any fraudulent intent be shewn, it ought not to be supported. But this is expressly negatived by the learned Vice-Chancellor, and the evidence is not against his finding upon that point.

The tendency of some of the observations of the learned Vice-Chancellor, is to question the soundness of the decision in *Jackson v. Bowman*, on the ground that "nothing which is not liable to execution is within the statute * * and it is difficult to see how these improvements could have been seized in execution." The case was one of first impression, and was confessedly not without its difficulties; but it was decided fourteen years ago; it has been frequently quoted since, and as far as I know has not been questioned before. I have no doubt that the decree did practical justice between the creditors and the wife of the debtor; and I am by no means convinced that it is assailable upon the ground suggested by the learned Vice-Chancellor. The debtor took money and goods—his circumstances not warranting his withdrawing either from his creditors, and employed them in building a house upon land which he had, by a conveyance which under the circumstances was effectual, conveyed to his wife. The money and goods so withdrawn from creditors were liable to be taken in execution at their suit. Now the language

of Lord Hatherley, then Vice-Chancellor, in giving judgment in *Barrack v. McCulloch*, 3 K. & J. 117, was this: "The 1 & 2 Vict. ch. 110 expressly enacts that money and bank notes shall be capable of being taken in execution, and, therefore, I apprehend that a person largely indebted could not pass over to a child either money or bank notes, for the purpose of making a purchase, or if he did that his creditors might follow the money which he had so handed over covertly as against them into the land or stock or whatever else had been purchased therewith, and any voluntary gift of it would be void against them."

In *Dundas v. Dutens*, 1 Ves. Jr. 198, the thing settled was stock, and I think that in the other cases of that class the subject of settlement was something which was not at that date liable to execution, and for that reason the settlement was held to be not within the mischief of the statute; and this is entirely consonant to reason, for it is the withdrawing from the reach of creditors that which is exigible at the suit of creditors that is evidently pointed at by the statute; the avowed object of the statute and its language shew this very plainly. It ought to be immaterial, and I think it is immaterial, whether that which is withdrawn from creditors is converted into something exigible at the suit of creditors or not. If converted into something not exigible, then, in the language of Lord Hatherley, the creditors may follow that which has been withdrawn from them into land or stock or whatever else had been purchased therewith; and this is most reasonable, and is, I think, supported by authority.

As the judgment in which *Jackson v. Bowman* is to some extent impugned has come under review in this Court, I have thought it not unreasonable to offer a few observations upon the case, especially as my silence might be interpreted into acquiescence in the views expressed by the learned Vice-Chancellor.

In my opinion the appeal should be dismissed, with costs.

BURTON, PATTERSON, and MORRISON, J.J.A., concurred.

McCRAE V. WHYTE.

Insolvent Act of 1875—Unjust preference—Fraudulent Preference—Presumption of Innocence.

D. had been in the habit of obtaining from the defendant discounts, at an exorbitant rate of interest, of notes received by D. in the course of his business, very few, if any, of which were paid at maturity; so that in the course of about two years' dealings D.'s indebtedness amounted to about \$7,000. At this time D., who was represented as a man of very sanguine temperament, entered into a new line of business after obtaining goods on credit to the amount of \$4,000 or \$5,000, having represented to the persons supplying such goods that, although without any available capital, he had experience in business. About twelve days afterwards, D., being threatened by a mortgagee with foreclosure proceedings, which, if persisted in, would have had the effect of closing up his business, applied to the defendant, who advanced him \$300, part of which was applied in paying the overdue interest on the mortgage, and the surplus in retiring a note of D.'s held by the defendant, who granted D. an extension of time on other notes held by himself at a reduced rate of interest (if paid promptly); and the defendant then intimated to D. that he would have to work carefully to get through. In a suit impeaching the mortgage to the defendant, it was

Held (reversing the decree pronounced by Spragge, C.) that the plaintiff had not satisfied the *onus*, which was cast upon him by the Insolvent Act, of shewing that the mortgage given by D. had been so given in contemplation of insolvency; and, the presumption of law being in favour of innocence and fair dealing, the bill was dismissed, with costs.

THIS was an appeal from a decree of the Court of Chancery, declaring a mortgage executed by one George Erastus Depew, in favour of the appellant (Whyte) void as being an unjust preference of Whyte over the other creditors of Depew, and ordering Whyte to pay over to McCrae, as the assignee in insolvency of Depew, the sum of \$465 under the circumstances stated in the judgment.

The cause was heard at the sittings of that Court at Sandwich, in the Spring of 1881.

Depew was examined as a witness. Part of his evidence was as follows:

"Q. When did you become acquainted with Mr. Whyte? A. Well it must have been 1877. Q. You were then living in Morpeth, were you not? A. I do not remember whether I was living in Morpeth at the time. Q. But you had a small property there? A. Yes. Q. It was worth about how much? A. Well, I consider it ought to sell for \$1,000. Q. But it was subject to a mortgage for \$600, I understand? A. Yes. Q. Did Mr. Whyte know of that property? A. Yes, sir. Q. How do you know whether he knew the value of it? A. I could not say whether

he knew the value of it or not ; I do not know whether Mr. Whyte has seen the property. Q. That was all the property you had, I understand, when you commenced dealing with Mr. Whyte ? A. Yes. Q. And your first transactions with him were in April and May, 1877, in the shape of getting money from him ? A. Yes I think that was about the time. Q. And the nature of your transactions with him was— ? A. Was discounting notes. I was selling instruments, and he was to discount my paper for me. Q. And how was it this claim arose to so great an extent in a couple of years, \$7,000, can you explain that ? A. In discounting paper; and paper would become due that was not paid, and interest would accumulate on those notes, charged to me ; and money that I got from him from time to time. Q. What rate of interest were you paying ? A. At first it was 18 per cent. Q. In October, 1879, you gave him a mortgage on some of your property, did you not ? A. Yes, sir. Q. How did that come about, had you any previous meeting with him ? A. When I traded the Morpeth property with Mr. Minnis, I gave him a mortgage on the property to meet the trade ; I got some money from him to pay on the contract. Q. You had a meeting with him immediately before the mortgage in October ; he came up to Leamington—Mr. Whyte ? A. I thought you had reference to the mortgage I gave on the property. Q. No ; I refer to October, 1879. He came up to Leamington ? A. Yes ; he was up to transact business with Mr. Marten. Q. Why did he come up there ? A. I got Mr. Marten to write to him about Mr. Setterington's mortgage ; I believe he was going to close the mortgage on account of payments that had not been paid up of interest. Q. And what did you want him to do ? A. I wanted him to fix it so that Mr. Setterington could not close the mortgage. Q. Did you write him to come up, or what ? A. I forget whether I wrote to him to come up or make arrangements with Mr. Marten. Q. At all events he came up ? A. Yes. Q. And what took place then ? A. I gave him a mortgage on the property. Q. But before you gave him a mortgage, you had an interview with Mr. Whyte ? A. Yes ; I told him what Mr. Setterington had said about the property. Q. What did you tell him ? A. On the house and lot that I got of Mr. Watson a mortgage was given on it, and it had run out, but Mr. Watson said he was to have any length of time he wanted by paying the interest, but after I got the place, Mr. Setterington would not stick to that agreement, and said that he would close the mortgage for \$500 on the Watson property, and when they came up I figured up what the mortgage was in favour of Setterington, what the amount would be, and Mr. Whyte said if he wanted his money, why he could have it at any time, and I gave him a mortgage ; he said in case Setterington wanted it, it would secure him if he had to pay Setterington's mortgage, and they advanced me, I think, \$300 at that time. Q. For what purpose ? A. I think the amount was to pay the interest on the mortgage to Setterington on the bank building, and four and a half acres, and on the Brown street building. * * * Q. When Mr. Whyte came up to Leamington, did he say anything about your position, and if so what did he say about it ? A. Well about the position in business, he spoke about the

paper that was overdue, my paper and customers' paper, and he said that he would have to make some arrangement to get it collected up, that it was accumulating fast and not being paid up, and interest made it up; he said some of it would have to be made—to collect it in. Q. Did he say anything as to the question of you getting through or not? A. He said that I would have to work carefully if I got through, and have to do a good business. Q. What else did he say, or did he say anything else on that subject? A. He said that his advice to me would be to let each party pay themselves. * * Q. That is, the commercial business take care of itself, and the other business of itself? A. Yes, I think that was what he meant. * * Did he say anything else in regard to the question as to getting through or not? A. Well, he expressed doubts that I would have to work very carefully; I did not know his meaning; I suppose it was given by way of advice to me. Q. What knowledge had he as to your position? A. He had as good an idea of it as I had. Q. Was he aware of your different properties? A. Yes. Q. Was he aware how you purchased your farm? A. Yes, sir. * * * Q. And, by the way, he states in his answer and also states in his evidence that \$700 was to be paid in exchange for that Leamington, property; is that correct? A. I paid \$200 in money and a \$175 organ; that was the amount that I gave for the difference."

At the conclusion of the argument the following judgment (as taken down by the Stenographer of the Court) was delivered by

SPRAGGE, C.—"The learned counsel for the defence has put the best face he possibly could upon this transaction, which has impressed me very unfavourably. I may as well go back a little to the dealings between these parties. The plaintiff is an assignee suing on behalf of the creditors; and the defendant is a person who has obtained a mortgage on the 3rd October, 1879, the insolvency taking place on the 21st of February, 1880, by an assignment of the debtor, he being then in business, and having been in business for a little over three months; and the transaction being beyond the thirty days before the insolvency, it is of course necessary that the plaintiff should shew that what was done was in contemplation of insolvency. The parties appear to have commenced business dealings, in 1876, the insolvent being then the agent of two persons, one a brother, and the other a person of the name of Whitney, at Detroit, for the sale of pianos and organs. A short time after he changed the business to this extent, that he went on his own account, still continuing the sale of pianos and organs, and selling them on credit, and taking notes from persons to whom he sold them, which notes were discounted by Whyte, the defendant. Whyte, therefore, early became acquainted with the business in which this man was engaged, and his mode of conducting it, and his capacity for conducting it. It appears in evidence that scarcely any of these notes were met. That is one circumstance that must have struck the defendant. Then he was so injudicious and careless in his dealings that he sold to persons nearly all

of whom failed in meeting their engagements. That appears to have been the business he carried on until a short time, twelve days, before the mortgage now in question was made. In addition to that business, for he appears to have been of a very sanguine temperament, he purchased a considerable amount of real estate on credit, giving mortgages for the purchase money; and for the payment of interest on this he again went on with the discounting of notes. This was the dealing between the two parties. The defendant therefore saw what he was doing, and he saw Depew's failures in everything that he undertook. He therefore knew his position, knew it exactly, knew it a great deal better than the man really knew it himself. It appears the mode in which he dealt with him was taking his notes at the enormous interest of 18 per cent., payable generally in two or three months, and the money advanced upon the creditor's notes in the same way, and compound interest upon the notes was obtained. No wonder, then, that it swelled up in the course of two years' dealings of that kind to the very large sum, for persons in the position of these parties, of about \$7,000.

"This was the state of affairs when Whyte was about, as he said, to go up to the place where this man Depew lived, to see him. He was about to go up when he received a telegram or letter from him asking him to go up, and then we see what passed upon that occasion. There was a prior mortgage upon the property called the Brown street property, to one Settrington, the interest on which was in arrear, and this man, who had commenced mercantile business some twelve days before, was hard put to it to find the money to meet the interest on this mortgage, and Settrington was threatening to foreclose, or rather to sell under the power of sale contained in this mortgage. Well, the best thing that Whyte could do for his own interest, apart from anything else, was, if possible, to secure himself, and he did advance the sum of \$300. That is the only thing that could possibly take this case out of the ordinary rule of a preference given to creditors. The man was at that time, it is said, paying interest on \$1,600; I have made no computation of that, but I did make a computation something to this effect, that paying his interest as he did on \$1,000 would in the course of a year amount to \$200 additional. That was the load he was carrying. Well, Whyte goes to him in October, 1879, and talks to him about carrying him for a year, which means, I believe, that he would supply him with sufficient funds to carry on his business for a year. Nothing of that kind was done; he paid him \$300 to satisfy the immediate demands of Settrington and pay some interest on other mortgages in which Whyte himself was mortgaged.

What is necessary to shew, to use the words of the statute, is, that this transfer, by way of security or otherwise, should be in contemplation of insolvency, and that it must be an unjust preference, &c. First, as to contemplation of insolvency, Whyte knew, as I have said, better than Depew himself knew, the desperate condition of his affairs.

"He had been sanguine enough to go on in the way I have described to acquire a very considerable property; a farm, bank buildings, and other things, without any solid basis of any kind whatever, and no money pay-

ments, no payments on the notes that he had taken from time to time, and paying the enormous interest I have described upon all these properties. He had then twelve days before engaged in business. In one sense the money was advanced to assist him, but it was not devoted to the carrying on of business in any direct sense, but only in this indirect sense, that it prevented him from being closed up at the time; it enabled him to struggle on for a few weeks longer, and that was all. Well, was insolvency then contemplated? We have the evidence, and there was a statement it appears given. To allude to that first; a statement at the time was prepared by Marten, at least he put down what was stated from this man's mouth as to how he stood, and then he says it shewed a balance in his favour of something like \$2,000; but we can easily see, and it is apparent from the dealings between these parties how this could swell to so large an amount; he over-estimated altogether the value of the property that he had. The property, I think, was \$5,000. He estimated it at perhaps double—or something like it—what it really brought or really was available for any purpose, and so there might be an apparent balance in his favour to that amount; but these keen-sighted men who were dealing with Depew knew better than he knew himself how he really stood; but what passed between these two men as deposed to by the banker and himself was, there was some good advice given, whether honestly given or not I am not prepared to say; perhaps it was; and that was, that what he received from his business should be devoted to the payment of debts connected with his business. Then there was some conversation as to how he stood, when White, this same defendant, says to him: "With care and good management you may work through, but it will be a hard job." Now, what was the meaning of that? The one contingency is, that with care and management he might work through; and the other contingency is, that without care and management he might fail, and that failure is insolvency. Can it be contended that this statement between the parties, with the knowledge that Whyte had of the failure of the insolvent in every enterprise he had entered upon, and looking to the future, that what was done was not in contemplation, not of the possibility only, but of the very probable result, insolvency; and that really occurred within a short time afterwards. That is the way it stood between these parties. Now, what the defendant did was not really assisting him in his business, it enabled him to struggle on a short while longer; but what he did was a great wrong to his creditors; what Whyte did was to give to this man a fictitious credit—a credit to which he was not entitled—a credit calculated to mislead creditors; whereas if he had been left as he ought to have been, to get on without this small advance, the indebtedness to these creditors would not have been to anything like the same amount.

"It was a positive wrong to creditors to give him this fictitious credit to enable him to mislead them; in fact, he was a party to misleading these creditors. Then see how Depew's estate now stands. The assets, as they turned out, not more than about one quarter of what his liabilities were, and that in a very short time after starting with this business, and

the real state of his business actually known to Whyte, who gained this preference, really better than to the man himself. I can have no doubt myself that what was then done was, in the proper sense of the term, in contemplation of insolvency, and that this was known to the creditor quite as well as it was known to the debtor, and done in the probable contingency of insolvency. If the debtor was over sanguine and did not perceive it, and that has been said of Depew, the language of the late Chief Justice Moss, that it was a contingency that any reasonable man ought to have foreseen, and any reasonable man should have foreseen, would apply. The defendant, over sanguine, possibly would not, but it was brought to his mind by the preferred creditor, so that he cannot excuse himself, nor can the creditor excuse himself by saying that it was not known. I am quite clear, for the reasons I have shortly stated, that the conveyance cannot stand, and certainly that it is unjust to creditors is beyond all question. He has done the creditors great wrong in concert with the debtor."

The decree drawn up was as follows :

"(1) This Court doth declare that the indenture of mortgage dated the 30th day of October, 1879, in said pleadings mentioned, was and is null and void, and should be delivered up to be cancelled, and doth order and decree the same accordingly.

"(2) And an account having been taken of the amount received by the defendant, in respect of the said last mentioned mortgage, and the same amounting to the sum of \$465, this Court doth order [and decree that the defendant do forthwith pay to the plaintiff the said sum of \$465."

The Appeal came on to be argued before this Court* on the ninth day of November, 1881.

Gibbons, for the appellant, contended that the evidence was not sufficient to warrant the finding that the mortgage in question was given "in contemplation of insolvency," for, on the contrary, the insolvent had then recently commenced a totally new business; and besides, the appellant in reality obtained no advantage or preference by the transaction over other creditors. The evidence clearly establishes that the security was given in consideration of a "present advance," thus bringing the case within the class of *Risk v. Sleeman*, 21 Gr. 250; but, in any view, he claimed that the appellant was entitled to be reimbursed for the moneys advanced, and to deduct the same from the amount realized on his security.

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J. H. McDonald, for the respondent, insisted that the evidence shewed that the mortgage of 30th October, 1879, being the mortgage in question, was made in contemplation of insolvency, and had the effect of giving the defendant an unjust preference over the other creditors of the insolvent: that the evidence shewed that at the time of the giving of the said mortgage the insolvent was unable to meet his engagements, and that the defendant was aware of such inability, and had not only probable but good cause for believing such inability to exist; and that the creditors of the insolvent had thereby been injured, obstructed, and delayed. The evidence fully warrants the assertion that no moneys had been paid by the defendant at or before the time of receiving this mortgage. It is true the appellant agreed to advance certain moneys, not for the purpose, however, of assisting the insolvent to carry on his business, but for the purpose of protecting the mortgage securities which the defendant had theretofore obtained, by paying the overdue interest on former mortgages, and the moneys advanced were applied in this way.

24 March, 1882. BURTON, J. A.—The bill in this case was filed by the assignee in insolvency of one Depew, to set aside a mortgage made by the insolvent to the defendant on the 30th of October, 1879, in contemplation as it was said of insolvency, whereby it was alleged that the defendant obtained an unjust preference over the other creditors.

The insolvency occurred on the 21st of the following February, nearly four months after the transaction now impeached, so that the onus was upon the plaintiff to shew that the insolvent contemplated insolvency at the time it was entered into.

The defendant was a private banker who had previously to this transaction had various dealings with the insolvent, among others the discounting, at a very large rate of interest, of notes taken by the insolvent from customers in the business in which he was then engaged.

The rate of interest was most exorbitant. But, looking at the fact sworn to, that very few of these notes were retired at maturity, perhaps not larger than the risk warranted; but it must have been clear to the defendant, and to any one but the insolvent himself—who is spoken of by the witnesses and the learned Judge as being of a very sanguine temperament—that no legitimate business could justify the payment, and that it must sooner or later end in stoppage.

At the time of giving the mortgage now in question the insolvent had ceased to carry on the business in which he had been previously engaged and had commenced a mercantile business, having purchased goods entirely upon credit from several wholesale houses in Toronto.

It appears that when his dealings with Whyte commenced he owned a property in Morpeth subject to a mortgage for \$600, the value of which he places at \$1000, but which the defendant places at a larger figure.

This property he exchanged with one Minnis for a leasehold property in Leamington containing four and a-half acres, and a village lot with a small house upon it. There was a sum of money to be paid to Minnis on the exchange, although the parties differ as to the amount; but whatever it was, was advanced by the defendant and included in a mortgage which was given to him for \$1000 on the 1st March, 1878.

The insolvent acquired, in addition to this property, a farm of about 50 acres and that known as the Brown street property. Both the farm and the four and a-half acres were subject to mortgages to one Settingington prior to Whyte's mortgage. And there was a mortgage on the Brown street property of \$500 prior to that in favour of the defendant. The defendant's mortgage on that property, which is for \$1,500, is the one impeached. This last property was in fact sold under Settingington's mortgage, and realized \$465 over and above his incumbrance, which sum the defendant received and is ordered by this decree to pay over to the plaintiff as assignee of the insolvent's estate.

The account given by the insolvent in reference to what took place on the execution of this mortgage is given in his evidence at p. 41 of the appeal book, and shews that an advance was then made by the defendant of \$300, the greater portion of which went to pay off interest on the prior mortgages held by Settingington, and a balance to retire a note held by the defendant. It was then arranged that the insolvent should have an extension of two years for the notes due to the defendant at a considerably reduced rate of interest, provided the interest was duly paid upon them as they matured.

The learned counsel for the respondent suggests that, with the experience that the defendant had of the insolvent's lack of punctuality, this was a very safe arrangement, and that the agreement to give time was purely illusory; that the money advanced went to relieve the property on which he held security and partly in payment of a debt due to himself, and that he could not but have been aware of the utterly hopeless position of the insolvent,

The learned Judge, who delivered judgment at the close of the argument, regarded the defendant's conduct very unfavourably, and was of opinion that he could not but have foreseen the probability, if not almost certainty, of insolvency which subsequently occurred. This, of course, would not be sufficient to invalidate the security, even if it were clear that thereby he obtained an unjust preference; and the learned Judge does not find as a fact that the insolvent did know his position, and did with that knowledge enter upon the transaction, but, citing the language of the late Chief Justice of this Court, held that it was a contingency that any reasonable man ought to have foreseen, and that the insolvent, over sanguine though he was, could not excuse himself by saying it was not known to him, as it was brought to his mind by the preferred creditor.

Cases of this description must of course be decided upon the peculiar circumstances of the particular case.

In the case of *Davidson v. Ross*, 24 Gr. 22, in which the remarks attributed to the late Chief Justice were said to

have been used, the insolvency occurred within thirty days, so that the onus of proving clearly that the insolvents did not act in contemplation of insolvency was cast upon the defendant; but the same learned Judge in the same judgment uses these expressions: "It is matter of every-day experience that Courts declare an impeached transaction to be surrounded with circumstances of grave suspicion; but that the evidence not having carried the case beyond the region of suspicion, and fraud being a thing to be distinctly proved, and not to be presumed, the transaction cannot be set aside. Facts must be proved which lead the judicial mind to no other conclusion than that of fraud. If the evidence in such a case leaves the matter in doubt the complainant must fail. If the case proved is consistent with honesty the defendant must succeed."

We find then in this case that, some days prior to the execution of the mortgage impeached, the insolvent had embarked in a new business, having been entrusted by his new creditors with some \$4000 or \$5000 worth of goods upon a representation that he had no available capital, but that he had experience in business: that he was shortly afterwards threatened with proceedings by Settrington, which, if persisted in, must have closed his business; and that in this emergency he applied to the defendant, who advanced him sufficient to meet the overdue interest and gave an extension of his own claim at a reduced rate of interest: that the defendant intimated to him at that time that he would have to work very carefully in order to get through; and the learned Chief Justice thinks that this intimation was sufficient to bring home knowledge of his position to the insolvent, even if he did not know it previously; but the insolvent denies this and says that he did not so understand his meaning, but supposed it was given by way of advice: that he himself thought he would get through if he had time. We have, in addition to this, that he was a man of very sanguine temperament.

It is not unfair to test the question in this way. If sued by one of the new creditors could we say upon this evi-

dence that he contracted the debt knowing or having probable cause for believing himself to be unable to meet his engagements, with intent to defraud? I confess that I should be unable to bring myself to that conclusion.

We all know that people do sometimes entertain exaggerated views of the value of their own property, and trust that in a short time it will improve largely in value, and that in many cases that expectation has been realized.

I do not say that parties are justified in entering into engagements upon that expectation. But it is a very different thing to say that a party is guilty of fraud if, in a *bond fide* belief of that kind he contracts a debt which, in consequence of those expectations not being realized, he is subsequently not in a position to discharge. In the case referred to, the presumption being that the transaction was in contemplation of insolvency, in order to rebut it sound policy, as the Chief Justice remarked, seemed to require something more than the mere assertion of the insolvent, however persuasive his demeanor, that he did not anticipate a result which must have appeared inevitable to any man of ordinary common sense in his position. Unless we can come to the conclusion that in engaging in the new business the insolvent intended deliberately to defraud his creditors, I find it very difficult to say that the plaintiff has satisfied the onus which was upon him of shewing that the mortgage was given in contemplation of insolvency, and adopting the language to which I have referred, the evidence leaving the matter in doubt the complainant must fail, the general presumption of law being in favour of innocence and honesty.

I think therefore the appeal should be allowed with costs, and the bill dismissed, with costs.

PATTERSON, MORRISON, J.J.A., and GALT, J., concurred.

BARBER v. MORTON.

Principal and surety—Non-disclosure to surety—Bill of exchange—Partial failure of consideration.

The defendant agreed with the plaintiff that whatever goods P. should order of the plaintiff he would become surety for. P. sent a written order to the plaintiff, who, in addition to the goods ordered, sent others, and the whole consignment was invoiced at prices higher than those quoted by the plaintiff, and than those at which P. had ordered some of the goods. Without disclosing these facts to the defendant, but in perfect good faith, the plaintiff presented a bill of exchange upon P. for signature by the defendant, who signed the same supposing that it was for the price of the goods as ordered. P. accepted the bill and kept the goods.

Held, reversing the judgment of the Queen's Bench, 45 U. C. R. 386, that the defendant was liable to the extent of the goods ordered, and that the consideration for the bill failed as to the excess only.

THIS was an appeal from the judgment of the Court of Queen's Bench as reported in 45 U. C. R. 386, where the nature of the pleadings and the evidence in the cause are clearly set forth.

The appeal came on to be heard before this Court on the 13th June, 1881.*

Bethune, Q. C., and *Falconbridge*, for the appellant.

E. D. Armour, for the respondent.

The points relied on and the cases cited appear in the report of the case in the Court below and in the judgment.

24th March, 1882. SPRAGGE, C. J.—This case is very fully reported in Vol. 45, of the U. C. Q. B. Reports. I have not met with any case resembling it in its circumstances. Patterson the principal debtor had been introduced to the plaintiff by the defendant, with an intimation that Patterson wanted to obtain certain goods from the plaintiff in order to trade with them in British Columbia; and he, the defendant, agreed verbally that he would be surety to the plaintiff for the price of such goods as the

**Present*: SPRAGGE, C. J., BURTON, PATTERSON, and MORRISON, JJ. A.

plaintiff might furnish to Patterson, upon his, Patterson's order. So far the transaction was an ordinary one. No limit was named as to amount. Patterson thereupon by written order—his letter of 9th April, 1879, covering a list headed an "invoice" describing the goods that he required—ordered certain goods from the plaintiff. The plaintiff sent these goods to Patterson, and sent with them other goods, which he assumed would be saleable, and that Patterson would accept them, sending at the same time a letter explaining why he sent them. He sent also a small additional quantity of other goods of the kind that were ordered.

The price of the goods ordered amounted to \$1,004.50; the price of the additional goods beyond those ordered amounted to \$142.40.

Concurrently with the sending of the goods to Patterson, the plaintiff went to the defendant, taking with him the railway bill of lading of the goods sent, and obtained from him the bill of exchange, sued upon in this action, and which was for the aggregate amount of the goods sent, being as well for the additional goods sent without order as for the goods ordered. No explanation was given by the plaintiff to the defendant, who assumed no doubt that all the goods for which he was giving his bill of exchange, had been ordered by Patterson. Barber ought to have explained the whole facts to the defendant, but it is not pretended that his omission to do so arose from any fraudulent intent. It was rather a loose, taking-for-granted way of doing business, than anything else.

The giving of this bill was the only thing in the way of a binding guaranty given by the defendant. It is all important therefore to consider the effect of what was done. The majority of the Judges in the Court below held that the defendant was absolutely discharged. The judgment of the learned Chief Justice proceeds upon this, that the contract of suretyship covered not only all that was sent upon the express order of Patterson, conveyed in his letter of 9th April, 1879, and the "invoice" inclosed in it, but also the

other items sent though not comprised in the "invoice;" on the ground that those other items were, upon their arrival, accepted by Patterson, and the sending of them by the plaintiff adopted by him.

I doubt if the evidence supports such acceptance and adoption, at any rate as to some of the articles sent; but assuming that fact in favour of the plaintiff, I do not see how it can fall within that which the defendant guaranteed. The guaranty, it must be assumed in the absence of explanation to the defendant, was given upon the assumption that it covered the price of the goods ordered, and not the price of any other goods. If it had been explained to him that it covered the price of other goods besides those ordered, he might perhaps have declined to be responsible for the additional goods sent. Patterson himself was not then responsible for them, and if he afterwards made himself responsible it was by acts with which the defendant had nothing to do; and which could not, I conceive, fix the defendant with any liability,

The question then arises, whether the obtaining of the guaranty under the circumstances that it was obtained operates to the discharge of the defendant from all liability, or only *pro tanto*. There was not the full disclosure to him that there ought to have been, but still no *suppressio veri* with any fraudulent intent. Though the difference in quantity and value cannot be said to be so trifling as to be unimportant, yet having regard to the fact that the defendant had placed no limit upon the amount for which he would be responsible for goods ordered by Patterson, and that he made no objection to, or even any remark upon the amount of the bill of exchange, there is nothing to lead to the conclusion that there was any wilful withholding from him of the exact truth.

Is there then any sound reason why he should not be held liable to the extent to which he did strictly guarantee payment.

The language of Baron Pennefather in *Lindsay v. Parkinson* 5 Ir. Law Rep. 127, commends itself for its good

sense and negation of false sentiment. After expressing his concurrence in the soundness of the decision given by the Court of Exchequer in England in *Mayer v. Isaac*, 2 M. & W. 612, the learned Baron proceeds: "I have often heard of the alleged hardship of pressing sureties, but I have no notion of yielding to such an argument. Let a party about entering into a guarantee look well to the consequences; and let him not, after the party whom he undertakes to guarantee has obtained credit for goods on the faith of his undertaking, turn round and say, I am to be regarded favourably in a court of justice; and the instrument is to receive in my case a construction which it would not receive in any other." There is no doubt language of a different character to be met with here and there in the books, but I have met with none more distinguished for its plain good sense and for its regard for what is right as between all parties than that of the learned Baron.

Most of the cases in which the surety has been held discharged by matters which invalidated the contract of suretyship *ab initio*, have been cases of guaranty for the fidelity of a person employed, or about to be employed by the person guaranteed; and it is obvious that in such cases the contract must be good *in toto* or not at all.

The weight of authority appears to me to be in favour of the rule enunciated in *North British Insurance Co. v. Lloyd*, 10 Ex. 523. Chief Baron Pollock, delivering the judgment of the Court, said, in reference to an opinion that appears at one time to have prevailed, that the rule as to disclosures of all material facts in assurances upon marine and life risks, applied also to contracts of guaranty: "It seems to us an incorrect proposition that the same rule prevails in the case of guarantees, as in assurances upon ships or lives, in which it is a settled rule that all material circumstances known to the assured are to be disclosed, though there be no fraud in the concealment. * * * We think the doctrine laid down by Lord Campbell perfectly correct and applicable to the guarantee in question. The

non-disclosure of the circumstances of the change of security, even if it had been material, would not have vitiated the guarantee, unless it had been fraudulently kept back; and there was no ground to impute fraud in fact to the plaintiffs or their agents."

A case somewhat in conflict with this view of the law, *Railton v. Matthews*, 10 C. & F. 935, had been decided in the House of Lords ten years before. In the earlier case the question was whether the charge of the Lord Justice Clerk to the Jury was correct. The charge was, that "the concealment must be, first, of things known to the defenders, or which they had strong and grave grounds to suspect; secondly, that the concealment therefore being undue, must be wilful and intentional with a view to the advantage they were thereby to receive." The issue, as stated by Lord Cottenham, in appeal, was, whether the surety "was induced to subscribe the bond of caution or surety by undue concealment or deception on the part of the defenders or either of them," and, speaking of the charge to the jury he says: "The learned Judge lays it down distinctly that the concealment to be undue, must be wilful and intentional with a view to the advantage they were thereby to receive." And his lordship adds his own opinion: "In my opinion there may be a case of improper concealment, or non-communication of facts which ought to be communicated, which would affect the situation of the parties even if it was not wilful and intentional, and with a view to the advantage the parties were to receive. The charge therefore I conceive was not consistent with the rule of law." Lord Campbell concurred with Lord Cottenham that the charge was erroneous, giving his own reasons for his conclusion. Mr. DeColyar, in his book on the Law of Guarantees, p. 284, says: "The only way in which this case can be reconciled with the *North British Insurance Co. v. Lloyd*, is on the assumption that the objection of the House of Lords must be confined to that part of the judge's charge where he ruled, that a concealment does not vitiate a guarantee unless the party

guilty of it had his own particular advantage in view," and he cites several passages from Lord Campbell's judgment in support of his view, adding: "It would therefore *seem* that Lord Campbell *might* have agreed with the learned Judge if he had only laid down that concealment, if not wilful and intentional, will not vitiate a guarantee." The judgment followed immediately upon the argument, and we have not the judgment of any of the Law Lords other than the two named.

The case in the Lords was referred to in the *North British Insurance Co. v. Lloyd*, and in several cases referred to in Mr. DeColyar's book, and a large number of cases upon the same point are referred to in the note to Mr. Perkins's edition of the reports in which the case is reported. In the subsequent case before the Lords of *Hamilton v. Watson*, 12 C. & F. 108, Lord Brougham, in giving judgment, observed: "Fraud is neither averred, nor supposed to be averred, nor are the circumstances so stated as to raise the inevitable inference of fraud or deception." In the case before us none of the pleas impute fraud or wilful concealment of any material fact.

In the subsequent case of *Pledge v. Buss*, Johnson 665, before Sir W. Page Wood, then V. C., he says, referring to one of the grounds taken in the case, "that there was no binding contract of suretyship by reason of the fraudulent concealment or representation practiced by the defendant, and adds: "I use the word fraudulent, because on the authority of *Hamilton v. Watson* and *North British Insurance Co. v. Lloyd*, I take it to be settled that there must be something amounting to fraud to enable a surety to say that he is to be released from his contract on account of misrepresentation or concealment."

I have already given my reason for thinking that the defendant's liability is limited to goods ordered by Patterson. To the extent of the goods ordered, I see nothing to relieve him from liability. We have to look at what passed anterior to the giving of the guaranty to relieve the defendant from paying the full amount of the bill of

exchange ; and looking at that, we see that to have passed between the parties which satisfactorily, to my mind, negatives fraud in relation to the bill of exchange.

My conclusion is, that a rule should have been made absolute to enter a verdict for the plaintiff for \$1,040.50 and that the plaintiff should have his costs in the Court below and in this Court.

BURTON, J. A.—Some of the questions which were argued do not appear to me to be open upon this record.

The action is upon a bill of exchange. There is no plea alleging fraud or anything from which fraud is necessarily to be inferred.

The first plea is, in substance, that the bill was drawn by the defendant in favour of the plaintiff upon, and accepted by one Patterson in payment of the price of goods at or about the time of the drawing of the bill sold by the plaintiff to Patterson according to sample, and which were to be made in a workmanlike manner, and according to certain samples ; alleging a failure to deliver, and a consequent total failure of consideration. This, which if sustained in evidence would have been a good defence to the bill, was not proved.

The second plea alleges an agreement between Patterson and the plaintiff, under which the former agreed to buy from the plaintiff goods according to sample, to be made and manufactured by the plaintiff so as to be suitable for and saleable in the market of Victoria in British Columbia, and the defendant agreed to become surety for the payment by Patterson of the price by drawing a bill of exchange upon Patterson in favour of the plaintiff for the price. But the plaintiff afterwards, and without the knowledge or consent of the defendant, altered the agreement, and did not deliver the goods agreed upon, but on the contrary not only sold and delivered a quantity of goods which did not answer the sample, and which were not made or manufactured in a good and workmanlike manner, and which were wholly unsuitable and unsaleable in the said market, but

also without the knowledge of the defendant delivered goods in excess of those ordered, and for the payment of which the defendant agreed to become surety, and which also were wholly unsuitable and unsaleable, and the defendant at or about the time of this contract drew the bill of exchange according to the said agreement only, and the bill included the price of goods in excess as well as the others, of which the defendant was then ignorant.

There is no averment in this plea that the goods were refused by Patterson either on the ground that they did not comply with the order, or were in excess of the order, and the evidence shews that he made no complaint to the plaintiff, although a portion of the goods—but to what amount does not appear—was sent back to Toronto to the address of the defendant, who refused to receive them.

A third plea was added by Judge's order, in which the breach of the agreement is stated in not selling the goods at the price agreed, but at another and higher price than that for the payment of which the defendant had agreed to become surety, and that he accepted the bill in ignorance that the agreement had been varied in that respect.

This plea was also unsupported in evidence. There is no evidence that there was any restriction as to the price, but the guarantee was for any goods Patterson should order.

The question, therefore, is confined to the second issue, or that portion of the second issue which relates to the excess of goods beyond those ordered, for as to the rest it is not proved. Assuming the plea to be amended and confined to the excess, then it would seem to me to set up only partial failure of consideration, and that we are not called upon to decide whether, if that issue had been directly raised the failure to mention that a portion of the goods invoiced to Patterson had not been ordered, but were sent on approval only, although subsequently accepted, would have relieved the defendant from liability on the bill.

It is conceded that no wrong was intended, that the concealment was not designed or with a view to any advantage to the plaintiff. The defendant, though not legally, was morally bound to secure the payment of those goods which had been ordered, and with the difference of opinion which exists even among learned Judges as to the liability of the defendant for those goods which were sent without a direct order, if subsequently accepted, the plaintiff might well be excused for adopting the view that the defendant would be liable for the entire invoice.

The evidence shews that the amount of these goods was not large; that they were included partly with a view to fill the cases, so as to prevent the other goods shifting, and that such was a common practice.

There is no pretence, therefore, for anything like moral fraud, so that if there were an issue raising the question it would be whether the obtaining of a negotiable instrument innocently for a larger amount than the guarantee extended to, was such a fraud in law as would vitiate the instrument. As at present advised, I do not think that point is before us, and that the only question now calling for decision is, whether there was a partial failure of consideration.

Patterson might, probably, in consequence of the order being exceeded have refused to accept any part: see *Levy v. Green*, 1 E. & E. 973; and had that been so the defendant would not have been liable at all upon the bill; but he did not do so, and whether the defendant would be liable upon it or not for the goods sent on approval, and afterwards accepted, I can see no good reason for his escaping liability for those goods which were sent in terms of the order.

Partial failure of consideration is a good defence *pro tanto* against an immediate party where the failure is an ascertained and liquidated amount, and although not without some doubt I have come to the conclusion that the defendant is not liable for the goods not ordered. I think, as already intimated, the defence fails upon the evidence as to the other goods; they were received by Patterson, and

no complaint was heard from him by the plaintiff till after the maturity of the bill. I am of opinion, therefore, that the plaintiff was entitled to recover on this bill to the extent of the goods ordered and accepted, and that the rule should be made absolute to enter a verdict for that amount, and the appeal to that extent allowed with costs.

PATTERSON, J. A.—I have been strongly impressed with the force of one ground taken by the appellant, and which is the same as that on which the learned Chief Justice in the Court below considered him entitled to succeed, viz., that the agreement of the defendant was to guarantee payment by Patterson for whatever goods he bought from the plaintiff; and that although some of the goods now in question were not ordered by Patterson before being sent to him by the plaintiff, yet he afterwards accepted them, and, in short, bought them. I do not gather from the evidence that when the three parties met in Toronto, there was any idea that it was necessary to be very guarded in the expressions they used. Had it been so, we should no doubt have a memorandum in writing. The defendant introduced to the plaintiff his connexion from British Columbia, as a purchaser. The goods were bought, partly paid for and partly secured by note which the defendant indorsed. It is said that at the first of two interviews in Toronto, the defendant gave the plaintiff to understand that he would secure whatever Patterson ordered. In fulfilment of that promise he indorsed the first note. He intimated that he would do the same in case of future purchases. Most likely the words used were future orders, or that he would secure whatever further goods Patterson might order. But it seems to me very unlikely that stress was placed on the literal force of the word "order." To suppose so would be to imagine a dealing at arm's length which is not at all suggested, and which, if it had existed, would, no doubt, have led to a note in writing being made. The defendant's own evidence, to which I shall presently refer, seems to me to

quite bear out this view. I dare say that, if we knew exactly what occurred on the first occasion, we should find that many of the goods then bought were only *ordered* in the sense of being first submitted to the purchaser by the seller, and then accepted by the purchaser. Whether such a transaction took place between gentlemen separated by a counter or by a continent, the essence of it would be the same. The bit of evidence to which I allude is this; the defendant says that after drawing the bill now in suit, "the next I got was an intimation from Patterson that the goods were not according to order, and more than ordered; thereupon I told him to write direct to Mr. Barber." Then he says, that seeing Mr. Barber after the bill fell due, "I then told him about this difficulty with Mr. Patterson, that I could not possibly recover from him; that I would have to let him sue me for the amount, and that whatever amount was recovered against me, I would have recourse against Patterson for." Every word of this is entirely consistent with what I should have gathered from the other evidence was the defendant's undertaking, viz., that he was to guarantee whatever Patterson became liable to pay. His reason given to the plaintiff for not paying is, that Patterson was not liable, as he interpreted the position shewn by the letter he had received; not, as now contended, that Patterson's liability was not to be the measure of his, inasmuch as while Patterson was liable for whatever he *bought*, the defendant was only to guarantee what he *ordered*.

If the case necessarily turned upon this matter of fact, I should hesitate long before holding that the conclusion arrived at by the Chief Justice was not more in accordance with the true effect of the evidence than that adopted by the other members of the Court.

I think, however, that we may find for the plaintiff for an amount which, though possibly less than his strict rights entitle him to, will yet approach substantial justice to both parties, without straining any rule of law, and without overruling the finding of the majority of the Court upon the facts.

I am the more disposed to this course from the circumstance that one of the learned Judges composing the majority was the Judge before whom the case was tried.

Therefore, proceeding on the basis that the defendant was to guarantee only the goods ordered before they were shipped, I think the following propositions established.

The plaintiff, having no written guaranty, required a writing to bind the defendant; the writing given was the bill drawn by the defendant on Patterson payable to the plaintiff's order:

The bill was the medium by which Patterson was to pay, as well as that by which the defendant was to secure the payment:

The bill was accepted by Patterson, and therefore, so far as he was concerned, it was properly drawn:

But it included the price of goods not ordered before shipment, and therefore outside the defendant's promise:

There was no fraud in this, but only an assumption that, if Patterson accepted the goods, the defendant would guarantee whatever Patterson agreed to pay:

There is nothing in the additional price charged for the ordered goods. They were the same goods that were ordered, and if Patterson might have declined to receive them on account of the national policy advance in price, he did not refuse them:

There was, therefore, no change of the contract between the plaintiff and Patterson touching the goods that were ordered. The other goods were outside of that contract. The delivery and acceptance of them formed a new contract concerning those goods alone, and not a variation of the contract for the ordered goods. Patterson might, of course, have refused to accept the additional goods; but he did not refuse, and we are not at present concerned about those goods.

Even if by reason of the additional goods being packed and invoiced with the others, he might have rejected the whole—which no case quite decides, though *Levy v. Green*, 1 E. & E. 968, and *Cunliffe v. Harrison*, 6 Ex. 903, are in that direction—still he did not reject them.

Thus the defence fails which was rested upon doctrines concerning the discharge of a surety by the variation of the principal contract.

Then defendant having agreed to guarantee the ordered goods, and having drawn the bill with the intent of guaranteeing goods which he assumed to have been ordered, why should he not—there being no fraud—pay what it is admitted he meant to secure?

If the undertaking had been a memorandum saying, "I guarantee payment for whatever goods Patterson orders and you supply," there would be no doubt of his liability. Is there anything to prevent his being liable on this bill to the same extent?

I think the defence resolves itself into one of failure or absence of consideration. In consideration of plaintiff supplying Patterson on credit with such goods as he should order, the defendant agreed to secure payment for them. To the extent of the goods ordered, there was therefore consideration. Beyond that the consideration was wanting. The failure, however, was to a definite amount, and consequently only affords a defence *pro tanto*.

The plaintiff's fifth reason of appeal is too wide when it takes the ground that the real defence being failure of consideration, the plaintiff must succeed in full; but, in raising the question, it places the controversy on what I consider its true basis.

It may seem unnecessary to cite cases as authority for a doctrine so well established as that a partial absence of consideration for a bill may, when the amount is liquidated, be shewn in answer to an action for the whole nominal amount, whether an original absence of consideration or a subsequent failure is relied upon. I may, however, be permitted to refer to one or two cases, the facts of which make the decisions very apposite to the present one.

In *Darnell v. Williams*, 2 Stark. 166, the defendant having agreed to accept for £10 accepted at the plaintiff's request and for his accommodation for £19 5s. Lord Ellenborough held that although with respect to third per-

sons the amount of the bill might be £19 5s., yet between these parties it was an acceptance to the amount of £10 only. The same learned Judge had, when at the bar, contended in the case of *Burber v. Backhouse*, Peake 61, that a bill which was admitted to be good for part of the amount, by the payment into Court of that part, must be held good for the whole, but Lord Kenyon held otherwise; and Mr. Law, after looking into the cases, said he was perfectly satisfied with the ruling. The defence there was that the acceptance was, except for the amount paid into court, given for a separate debt of one of the defendants, who had given it unknown to the other defendants who were his partners. In *Forman v. Wright*, 11 C. B. 481, it was held that a plea of partial failure of consideration was sustained by proof that the defendant had been induced to give his note for £32 6s. 10d. upon the representation, which was false, but not made fraudulently, that he owed that sum, when in fact he only owed £10 14s. 11d.

The acceptance in this case was for \$1,155.86. The invoice amounted to \$1,146.90, of which the goods not ordered were, socks \$37.50, pants \$59.40, and jackets \$9.50, making \$106.40, or a little over nine per cent. of the whole. The excess of two dozen articles in each of two other items over the fifty dozen mentioned in the order is, I think, explained to come fairly within the effect of the order. I propose, therefore, to deduct ten per cent. from \$1,155.86, leaving \$1,040.28, for which sum, with interest from 5th November, 1879, and notarial, I think the plaintiff should have judgment; and to make the rule absolute to enter a verdict for the plaintiff for that amount.

The appeal should therefore be allowed, and I see no good reason for refusing the appellant his costs.

6215.2

CAMERON, J., concurred.

JESSUP V. GRAND TRUNK RAILWAY COMPANY.

*Railway Company—Grant of land in consideration of erecting a station—
Form of conveyance.*

The plaintiff agreed with the contractors for the building of a railway, to convey to them in fee simple six acres, to be increased to ten if necessary, in consideration of their placing the station for the town of Prescott thereon. After the road had been surveyed and the station buildings erected on the property, the plaintiff executed a conveyance thereof to the contractors which contained a covenant by them to continue and maintain the station on those lands from thenceforth, but the deed was never executed by the grantees. The company continued to use such station for about ten years, when they removed it to a distance of one and a-half miles.

Held, reversing the judgment of the Court below (28 Gr. 583), that the act of the company in thus placing and using the station was a substantial compliance with the agreement, and that they were not bound to continue that station there for all time.

Per HAGARTY, C. J., *semble*, that upon the defendants ceasing to use the lands for the purpose for which alone they had been conveyed, the grantor would be at liberty to resume possession.

Per PATTERSON, J. A., That even if the plaintiff were entitled to claim such possession in consequence of the company ceasing to use the land for the purpose for which alone it had been conveyed, the fact that the company had resumed the use and occupation during the progress of the cause would be considered a material fact upon an application to alter the frame of the bill in order to ask that relief; and under the prayer for general relief the Court would not determine that the plaintiff was entitled to re-enter, even though facts apparently sufficient to justify such a decree might be alleged in the pleadings and deducible from the evidence.

The proper form of conveyance that should have been used for effecting the plaintiff's purpose suggested.

THIS was an appeal by the defendants from a decree of the Court of Chancery, made the 11th day of June, 1881, whereby it was declared,

"(1) That according to the true construction of the agreement in the pleadings mentioned the defendants are bound to keep and maintain their station upon the lands and premises in the pleadings mentioned and to use the same as a regular freight and passenger station, and doth order and decree the same accordingly. (2) And it appearing that since the hearing of this cause the defendants have resumed occupation of the station erected upon the lands of the plaintiff in the bill of complaint referred to, this Court doth further order and decree that the defendants do pay to the plaintiff his costs of this suit forthwith after taxation thereof."

as reported 28 Gr. 583, where the facts are stated, and came on to be heard before this Court on the 14th November, 1881.*

**Present*—HAGARTY, C. J., BURTON, PATTERSON, and MORRISON, JJ.A.

S. H. Blake, Q. C., for the appellants.

Bethune, Q. C., for the respondent.

On behalf of the appellants, it was insisted that they had complied in good faith with the terms and conditions upon which the lands had been conveyed to the contractors, by placing the station on the lands in question, and having used and maintained the same there for a number of years ; and there was not anything, either in the agreement to convey or in the conveyance which had been executed in pursuance thereof, compelling the company for all time to continue the use of such station as a regular freight and passenger station ; their having placed it on the property, which no one for a moment alleged was not done *bond fide*, was all that they were called upon to do.

The respondent contended that under the contract the company were bound to establish, have, and forever continue and maintain the station upon the lands so conveyed, and to use the same as a regular freight and passenger station and depot for the town of Prescott.

The authorities cited are mentioned in the former report and in the judgment.

March 24, 1882. BURTON, J.—The plaintiff bases his right to compel the defendants to maintain a station upon the lands referred to in the pleadings, on an agreement entered into on the 29th October, 1853, between him and Messrs. Jackson, Peto, Brassey & Betts, who were the contractors for the construction of the defendants' railway. By that agreement, in consideration of their placing the station of the Grand Trunk for the town of Prescott upon his land, he agreed to convey to them in fee simple for that purpose six acres, to be increased if necessary to ten, the deed to be given as soon as the line was located, and the land set out by the contractors or the company's engineer.

There was a stipulation that if the station was not placed on the plaintiff's lands the agreement should be void, and that neither the contractors nor the company

should be bound to accept the offer by taking the agreement.

The contractors took possession of the ten acres under this agreement, and built a station, and in the year 1856 they transferred the road to the company.

The contractors were under engagement with the company to build the road and its necessary stations, to furnish the right of way and station grounds, and the necessary equipment of the road, for £10,000 per mile.

At the time that the contractors made over the road to the defendants they were in possession under the agreement merely, some difficulty having arisen with the plaintiff as to the terms on which the lands should be conveyed; the plaintiff contending that he was entitled to certain crossings, the centre one of which, if the demand had been acceded to, would have passed through the station house, and his demand not being complied with he instituted proceedings to eject the company, which led to the filing of a bill by the contractors to stay those proceedings, and for a specific performance of the agreement.

The Court of Chancery were satisfied upon the evidence that there had been no stipulation as to crossings, but that the plaintiff had intended to rely on the liberality of the Company as to what crossings there should be, and where they should be placed, and a decree for specific performance was made. Subsequent to this decree a conveyance was made which recited the contract and decree, and conveyed the ten acres to the contractors absolutely in fee simple without limitation or condition, but contained covenants on their part, among other things, that "the depot and station of the railway company for the town of Prescott should always henceforth be established, had, continued and maintained on the said ten acres thereby conveyed." This deed was not executed by the grantees, and was apparently not communicated to the company. Their solicitor, Mr. Bell, states that he never saw it, nor was he aware of its contents until produced at the hearing, and, in point of fact, it had never passed out of the hands of the contractors' solicitors, who held a lien on it for unpaid costs.

Any equity which the plaintiff has, therefore, against these defendants must depend upon the construction of the agreement of October, 1853.

It is clear that the contractors under their agreement with the defendants were bound at their own expense to furnish the station grounds, and erect the station buildings, and to convey them in fee simple, free of any incumbrances, to the defendants. Mr. Bell, who was acting as their solicitor, as well as for the company, was fully aware of the terms of this contract, and knowing the views of the company, was willing to recognize the agreement for the conveyance of the land upon the understanding that if accepted the station buildings would be placed there. The agreement so called was in the nature of an offer, which the contractors were at liberty to accept or refuse, and it would seem upon the evidence that other offers were made, and that the contractors and their solicitors were not at all anxious to close the bargain. Whenever the company's engineers located the lands and filed the plans the plaintiff was bound to convey, as I understand the agreement, an absolute and indefeasible title.

They did comply with the condition, erected the station buildings, and were then entitled to a conveyance, and, as I think, free from any fresh conditions or limitations. They had, in fact, complied with the condition which entitled them, in terms of the agreement, to call for a deed of the land, the title to which, quoting from the offer, was to be clear and complete.

That that was the understanding of the parties is manifest not only from the circumstance to which I have referred, viz., that the contractors were bound to furnish an unincumbered title, and that the solicitor of the company was precluded by his instructions from accepting any conditional title, but also from the evidence of the plaintiff. He imagined that the placing the station there would have the effect—as in fact it had—of largely increasing the value of the rest of his property; and as a station once placed there would not on light grounds be removed, he was no

doubt satisfied to convey the land on the condition that it should be placed there. But I see nothing to warrant the inference that there was any stipulation for its permanent continuance. The contractors, as he knew, had no power to control the railway company, and I think it not unfair to assume that he knew of the relative positions of the contractors and the company. But even if he did not, if he desired to bind the latter to so unreasonable a position as that they should for all time and under any circumstances maintain a station there, he should have used in his offer some such unmistakable language as he has used in the conveyance executed in 1864. That conveyance, it is true, appears to have been prepared by the solicitor who was acting for the contractors; but it is highly improbable that he would have inserted the words to which I have referred except at the instance of the plaintiff. If he had desired his offer to be clogged with any such condition he should have so expressed it, and it is not difficult to conjecture what would then have been its fate. The language of this deed is also not without weight in considering the view which the plaintiff took of the agreement. The deed does not contain any limitation to the grantees and their heirs and assigns so long as the premises shall be used as a station, but is absolutely in fee simple.

I think there is nothing in the language of the agreement imposing upon the contractors, or the company as taking with notice of it, an obligation to continue the station on the land for all time, and that we would not be justified by adding to it by construction what the plaintiff might have expressed if it was so understood or intended.

I think therefore that this appeal should be allowed, and the plaintiff's bill dismissed with costs.

HAGARTY, C. J.—I am unable to agree in the opinion that the defendants are bound to retain the land obtained from the plaintiff perpetually as a Station for Prescott. I have seen no authority leading to that construction.

The bargain seems to me to be in substance, "You can

have so many acres of my land for nothing if you place your Prescott Station on it."

I do not see what right we have to construe this as meaning on the defendants' part: "In consideration of your giving us this land for nothing we undertake forever to maintain the Prescott Station upon it."

There was an actual compliance by the defendants with the bargain by placing and keeping the station there for many years. It was no illusory performance, but a substantial one.

As to the covenant in the deed, produced in some unaccountable and (to me) unintelligible manner, it is sufficient for me to say it is not executed by the defendants, nor as I can see in any way recognized by them.

In this view I think the plaintiff not entitled to any relief prayed by him, and that his bill should be dismissed.

I hesitate to enter on a discussion as to the plaintiff's right to re-enter on his land as soon as it ceased to be used by defendants.

No such relief is asked by the Bill. I incline to think that he is entitled to resume possession on failure of the purpose for which it was granted or demised. I cannot but think that the true meaning of the bargain was as stated; the defendants were to have the land free of charge for the purposes of a station, not for any other purpose: that in fact it would be by operation of law just as the parties agreed by contract in the case of *Wadham v. Post Master General*, L. R. 6 Q. B. 644, where premises were demised for 1000 years, at a nominal rent, to be used at all times as a post office and not otherwise; with proviso for re-entry for breach.

PATTERSON, J. A.—The plaintiff by his bill asks for specific performance of an agreement, or for damages for its non-performance. The allegation is, that the plaintiff agreed with Messrs. Jackson, Peto, Brassey & Betts, the contractors for the construction of the Grand Trunk Railway, that he would convey to them the land on which the

railway was to be built across his property, and a quantity of land upon which a station was to be erected, without compensation, in consideration that they and the defendants would build and maintain certain crossings over certain streets to be laid out upon the plaintiff's property, and would forever maintain a station for the use of the people of the town of Prescott and other persons travelling by the said railway, upon the said property. He avers that this agreement is binding upon the defendants, and complains that it has been broken by discontinuing to use a station which had been placed by the contractors on the land he gave for the purpose, and had been used by the defendants for several years until they substituted for it a station at the distance of several miles.

The plaintiff thus undertakes to establish two things as the foundation of his case, viz., that the contractors agreed to for ever maintain a station upon the land in question, and that that agreement became an obligation of the defendants which can be specifically enforced against them, or, at least, for the breach of which they are answerable in damages.

In my opinion the bill is founded upon a misconception of the relative rights and duties arising out of the transactions shewn by the evidence.

The only evidence of an agreement is that which is to be collected from the document of 29th October, 1853, and the fact that the contractors, acting under its authority, laid out the ten acres of land and *placed* there the station for the town of Prescott, with the honest intention of using that as the station for the town, and without any anticipation of a change of the locality of the station becoming necessary.

The station was built and in use in 1855. In 1856 the railway was handed over by the contractors to the company. The station was used till 1865, when another station was built at some distance, and the use of the one on the plaintiff's land discontinued, although the buildings were not removed. In June, 1876, this bill was filed, following

closely upon the first complaint of the removal which had occurred nine years before. We are told that pending this action the defendants have resumed the use of the old station and have discontinued the new one, not by way of submitting to the plaintiff's demand, but because it suited their arrangements to do so.

The document of 29th of October, 1853, is a deed poll executed by the plaintiff only. I shall read it in full, for the purpose of pointing out what seems to me to be its bearing against the present contention of the plaintiff, but at the same time in favour of the view that he has, under its effect, certain important rights proper to be noticed when considering the real force and scope of the proposal embodied in it, though they may be rights of a different kind from those asserted in this action.

On the one hand I allude to the absence of any intimation of an agreement or obligation to be entered into or assumed by the contractors, and on the other hand to the persistency and emphasis with which the purpose for which the land is to be granted is stated and reiterated throughout the whole instrument.

The deed is in these words :

"Know all men by these presents that I, Hamilton D. Jessup, of Prescott, in the county of Grenville, M.D., do hereby covenant and agree to and with William Jackson, Samuel Morton Peto, Thomas Brassey and Edward Ladds Betts, all of the city of London, in England, Esquires, the contractors for the construction of the Grand Trunk Railway of Canada, that in consideration of their placing the station of the Grand Trunk Railway of Canada for the said Town of Prescott upon my land on the line of the said Railway, being lot number four and the east half of lot number five in the first concession of the township of Augusta in said County, I will convey to the said Jackson, Peto, Brassey, and Betts, their heirs and assigns, in fee simple, six acres of the said land for the purpose aforesaid. And I hereby further agree that the said six acres may be taken either from off said lot number four, or from off both of said lots, as the said contractors their heirs or assigns may think best, the said quantity so to be taken to extend

one way across one or both of said pieces as aforesaid, and in width to be sufficient to make up said six acres, the land to be taken on the line of said railway when located, the deed to be given as soon as the line is located and the land set out by the said contractors or the company's engineers, the title to be clear and complete.

"Provided always, if the said station is not placed on said lands this agreement shall be void. And further, that the said contractors or said company shall not be bound to accept this offer by taking this agreement. The filing of the plans and the setting out on the ground of the land required, which the said parties are hereby authorized to do, to entitle them at once to the deed as aforesaid. If the six acres are not enough for the express purpose of said station, then a greater quantity may be taken to the extent required for the purpose aforesaid, not in any case to exceed ten acres."

There is, as I have said, no pretence, in anything here written, of binding the contractors by any agreement. An offer is made. It is expressed as a covenant, but is also described as an offer, which the contractors did not by taking the instrument, bind themselves to accept. The act of acceptance contemplated was something to be done upon the land itself, viz., the setting out of the particular tract, whether six acres or ten, or any intermediate quantity. By this act the offer was to be accepted: and what was the offer? It was to give in fee simple the land required for the purpose of the station, in consideration of the station for the town of Prescott being placed upon it. Six acres was the minimum quantity named, and this was to be increased to the extent required for the express purpose of the station, up to a maximum of ten acres.

The offer was accepted. The six acres were not deemed enough *for the express purpose of the station*, and the greater quantity, to the full extent of the ten acres, was taken as being *required for the purpose aforesaid*.

By the terms of the deed poll a conveyance in fee simple was to be given as soon as the plans were filed and the land set out. Had that been done this controversy would scarcely have arisen, because both parties would, or ought to have defined their rights and obligations.

The conveyance not having been made, a fair way of testing the merits of the dispute will be to consider what such a conveyance should have embodied. In other words, what was the intent and meaning of the offer which was made and acted upon, as evidenced by the document containing it?

The two prominent stipulations are, that the station shall be upon the land, and that the contractors shall, for the purpose of the station, have a grant in fee simple. There is not a word in the document, and not a word in the evidence, to indicate that the idea was at all present to the mind of either party that at any time whatever the contractors, or the railway company to whom the land would eventually go, should hold the land for any other purpose than as the site of the station for the town of Prescott. Evidence is not wanting to the contrary, but I found nothing upon it, though perhaps I may have to advert to it farther on. I prefer to test the signification of the document by the terms in which it is drawn. No one reading the offer would gather from it that the ownership of the land by the proposed grantees was ever contemplated, except in connection with the employment of the land for the designated purpose. That is the natural force of the language used; and if we regard its technical effect, under established principles of construction, we shall find that the only estate offered is one limited in its duration to the continuance of the station upon the lands.

That we are not to apply to the phraseology of an executory agreement like this the same technical rules of interpretation as would be imperative in construing a conveyance, is an elementary proposition. For example, the words "fee simple" would not in a deed be proper words of limitation; but, as we have them here, we understand them, just as in a will, to imply a limitation to the grantee and his heirs. On the same principle, if we give to the expressions "for the purpose," "for the express purpose," &c., the force they would have in a will, we find the offer which is made is of a defeasible estate only.

The doctrine may be found stated at p. 123 of Preston's edition of *Sheppard's Touchstone* in these words: "There are other words also, that in the King's grant, and in last wills and testaments, and in other special cases, do make conditions, as *ea intentione, ad effectum, propositum, intentionem*, paying, and the like. So that if one devise his land to J. S. *ea intentione, &c.*, that he shall pay W. S. £10, or to sell, &c., these are good conditions. But these words regularly do not make a condition when they are used in deeds."

If the offer to convey *in fee simple* were inconsistent with the evident desire and intention to secure the appropriation of the land to the purpose for which alone the plaintiff proposed to give it, the direct meaning of those words ought to be held qualified by the context. There is, however, no inconsistency. For authority on this point we may take a passage from Coke, 10 Rep. 97, b, "An estate of fee simple is either an estate of inheritance absolute and indeterminable, as where lands are given to a man and his heirs, he has such a pure and absolute estate which can never determine; or a fee simple determinable, and that is in two manners, *Sc.*, either expressly derived out of an absolute and pure estate in fee simple, or implicit, and derived out of an estate tail; out of an absolute estate in fee also in two manners; first, by condition, as upon mortgage, and that is called fee simple conditional; secondly, by limitation, as if A enfeoffs B of the manor of D, to have and to hold to him and his heirs, so long as C has heirs of his body; and that is called a fee simple limited and qualified; and in both these cases, the whole estate in the land is in the feoffee, and therefore no remainder or reversion can be expectant upon either of them; *implicite* and derived out of an estate tail," &c., going on to explain it.

Therefore, the deed to be given in pursuance of the offer, should, if properly framed, have conveyed the land to the contractors and their heirs, *habendum* so long as they maintained and used upon the lands the station for the town of Prescott.

Turning again to the Touchstone, p. 125, we read: "The most apt and proper words to make a limitation of an estate are *Quamdiu, dummodo, dum, quousque, si*, and such like. And therefore if A grant lands to B, to have and to hold to him and his heirs, until B go to Rome; or until he be promoted to a benefice; or until B pay to A or A pay to B £20, these examples, by reason of the words heirs, give determinable fees."

By a deed of this character the rights and interests of both parties would have been secured in conformity with the letter as well as the spirit of the bargain. They would, in my judgment, have by the conveyance and the limitation secured, on the one side, the required station grounds, and on the other the benefit of the station while it remained, and the reverter of the land if the station were discontinued. This was the measure of the advantages stipulated for, and as it seems to me, all that could, upon either side, have reasonably been demanded.

A covenant that the Prescott station should for all time remain in that particular spot, or that there should for all time be a station at Prescott, given by gentlemen who were merely constructing the works in order to hand them over to the company, would have been a much less business-like and effective security than the limitation of the estate conveyed. There is no suggestion in the written evidence that such a covenant was thought of in 1853, and it would be a matter of surprise to find that one had been given.

It was urged in argument that the contractors must be held to have dealt as agents for the company. They were, of course, acting under the statutory powers of the company. They could not, in their own right, adopt proceedings for compulsory expropriation of lands; and we are told that, for convenience sake, they sometimes had voluntary conveyances made directly to the company. But they were not agents to bind the company by contract; and in this particular instance the dealing was with them in their own names, and not with the company now assumed to have been represented by them. If a covenant

had been taken, it would necessarily have been their personal covenant. I do not understand upon what principle the burden of it would have devolved upon the company. The utmost they could have done was what, under the effect of the whole transaction, as I understand it, they did, namely to convey to the company the estate in the land determinable upon failure to maintain the station.

The consequence of not taking the conveyance was, that they took an equitable instead of a legal estate; but the quality of the estate was the same; and the estate which they transferred to the company, if they really did make a conveyance of this land, was of course no greater than that which they themselves had.

It seems that some years after the railway had been handed over to the company, and after, so far as I know, Messrs. Jackson & Co. had ceased to have any interest in these lands, a bill was filed by them against the plaintiff, and a decree obtained for specific performance of the original agreement. In pursuance of that decree, a deed was made by the plaintiff, which was produced at the trial from the custody of the solicitor for the contractors in the Chancery suit, with whom it had ever since remained. That deed contained a covenant on the part of the grantees to maintain the station. The deed was not executed by the grantees, and it has no bearing upon the rights of the parties to the present litigation. So far as it serves to show the view taken in 1864, by those connected with that suit, of the effect of the agreement of 1853, it recognizes the plaintiff's right to a continuance of the station, and does not assume what is now asserted for the defendants, that by the placing of the station upon the land with the *bona fide* intention of continuing it there the consideration agreed for was satisfied and the company entitled to the absolute ownership of the land, even though the exigencies of the traffic or the convenience of the public required the station to be elsewhere.

The form in which the plaintiff's interest was attempted to be secured by that deed was not in accordance with

the true effect of the agreement, if I construe it correctly. But although the contractors, or those who acted for them in 1864, may have been willing, or may, in obedience to the understood effect of the decree they had obtained, have submitted to give the covenant, the liability of the defendants could not thereby be enlarged. That liability must be measured by the state of the title when they took over the land in 1856.

Since the delivery of the judgment now in review, a decision has been given in the Court of Appeal in England, involving questions so nearly resembling some of those discussed before us, as to invite a somewhat extended reference. I allude to *Witham v. Vane* 44 L. T. N. S. 718.

In 1824, an agreement had been made by the Duke of Cleveland for the purchase of land from one Silverlop, in which agreement there was a stipulation that the conveyance should contain a covenant by the Duke that he and his heirs, &c., should pay to Silverlop and his heirs, &c., six pence for every chaldron of coals which should be wrought and gotten out of the estate, and which should be shipped for sale. The conveyance was executed by the grantor, and contained the covenant, but it was not executed by the Duke. In the action the representatives of Silverlop sought to make the Duke's personal estate liable upon the covenant, although the land had been sold and the mines were worked by the vendees. Mr. Justice Fry decided for the plaintiffs, presuming that, although the deed produced had not been executed by the Duke, he must have executed a counterpart of it. The Court of Appeal did not consider that presumption warranted by the evidence. James, L. J., said: "I am of the opinion that it is impossible to say that a covenant which has not been executed is the same as a covenant which has been executed, because the person who ought to have executed it, or who was intended to execute it, takes the estate. It is to me a novelty to say that because there is a conveyance to a man in fee simple and some covenant for him to execute which

he never did execute, he and his representatives are bound for all time by that covenant as if he had executed it. There appears to me to be no authority for that at law; and I am unable to see any principle upon which a man is to be held bound by a perpetual covenant, which he has not executed, to do something appurtenant, or in gross, merely because he has taken the land. If he had taken the estate he was, no doubt, under an obligation to give a covenant such as is mentioned in the agreement. If he has broken that agreement—and he did break it, for he died without having executed the covenant—if he has been guilty of any act of default in not executing the covenant, that default was committed many years ago, and was a ground of action for breach of the agreement to execute the covenant. All that could be done for breach of the agreement which he was legally liable to perform was to bring an action. * * Then is there any equitable liability as against the persons who have got the covenantor's personal estate? I am not aware that equity has ever enforced an affirmative obligation to pay money where there was no legal obligation." Baggallay and Lush, LJJ., expressed opinions to the same effect.

This seems very much in point upon one aspect of the present case. If the agreement of 1853 had gone farther than it did, and had contained the stipulation that the contractors should covenant to maintain the station on the land, which the plaintiff gives us reason to suppose would have satisfied him, from his executing the deed of 1864, the case would have resembled *Witham v. Vane*, and that decision would have been a direct authority against the liability of the contractors or their estates on the footing of a supposed covenant, and *a fortiori* against the liability of the present defendants. Yet that would have been a stronger case than the present, as here there was no undertaking to give a covenant. If what took place in 1864 could be used as evidence of a previous agreement to execute the covenant, and I do not say it could, it would only be evidence as against the contractors; but whether it

evidenced an agreement made in 1853 or in 1864, the doctrine laid down in *Witham v. Vane* would be decisive against any right of action remaining at the present day upon the contract.

But the decision to which I am referring touches also the question of the liability in respect of the condition annexed to the conveyance, although no right of action *ex contractu* existed. The parties who had the land were not before the Court, and that question was not decided; but the intimations of opinion given may nevertheless repay a reference to the language of the Lords Justices. James, L. J., remarked: "Of course, if a man takes an estate with an obligation not to do something, equity will prevent any person to whom the estate has come from breaking that obligation. I am not by any means prepared to say, whenever the point arises, as between the present plaintiffs and the persons who have got the estate with notice of that obligation, that when the estate was conveyed with the condition that the coal was to be paid for by the person who got it, or by the owner for the time being, anybody who has taken the estate as heir, appointee or assignee of the Duke, with full notice, ought not to pay for the coal which is being got under the contract."

What is here spoken of as the condition of the conveyance differs from that which exists in the case before us, inasmuch as it amounted to a kind of reservation out of the land itself; but the principle on which the land passed to the assignee subject to the condition is the same in both cases. In the case before us, if any condition was to be attached, it was one of three things: either (first) the erection of the station and its *bond fide* use, without any obligation to continue it; or (secondly) the perpetual maintenance on the land of the station; or (thirdly) the limitation of the estate in the manner I have discussed.

The plaintiff has failed, in my opinion, to establish any right to the relief he prays by his bill. Both the alternatives of the prayer, viz., specific performance and damages, suppose a contract which has not been shewn. He has not

founded his case upon the construction of his offer of 1853, which at present I think he is entitled to insist upon as against the defendants, and which, as against the defendants, I take to be the measure of his right. Therefore, the defendants not having been called upon to contest a claim to the possession of the land, it would not be proper, under the prayer for further and other relief, to decide that the plaintiff was entitled to re-enter, even though facts apparently sufficient to justify such a decree may be alleged in the pleadings and deducible from the evidence.

It has been necessary to discuss the question to some extent for the purpose of pointing out that, while holding the plaintiff not to be entitled to the relief he has asked for, I do not consider that he is necessarily left unprotected by his bargain in respect of the benefits he sought to secure in return for the gift of his land.

Whether or not the plaintiff ought to be allowed even yet to frame his bill so as to raise the question of reverter will be a matter for consideration in case he is advised to apply for an amendment. Upon such an application the resumption of the occupation and use of the station by the company, which has occurred pending this action, will doubtless be considered a material fact.

As the bill stands at present I think it should have been dismissed, with costs, and that we should allow this appeal, with costs.

FURLONG V. CARROLL.

Fire—Negligence—Jury, submitting questions to—Practice.

The R. S. O. ch. 50, sec. 264, makes it imperative upon the jury to answer questions submitted to them, and prohibits them from giving a general verdict instead. But the Judge after having put questions, may, nevertheless, in his discretion receive a general verdict.

Where fire has been properly set out by a person on his land for the necessary purposes of husbandry, at a proper place, time and season, and managed with due care, he is not responsible for damage occasioned by it. But where the defendant, while harvesting in his own field, threw upon the ground a lighted match thinking he had extinguished it, which however set fire to combustible material, and the defendant on afterwards discovering it, though he could easily have put it out, after confining it to one spot left it, anticipating no danger, and after burning for four or five days, the fire spread to the plaintiff's premises, and destroyed his barn with a quantity of grain and hay, the Court in reversing the decision of the Queen's Bench, considered that the principle and doctrine established in *Fletcher v. Rylands*, L. R. 3 H. L. 330, and *Jones v. Festiniog R. W. Co.*, L. R. 3 Q. B. 733, applied; and that the defendant was liable for the damage sustained by the plaintiff, even in the absence of actual negligence.

Gaston v. Wald, 19 U. C. R. 586, doubted.

THIS was an appeal from a judgment of the Court of Queen's Bench, refusing a rule *nisi* to set aside a verdict entered for the defendant, and for a new trial between the parties.

The action in the Court below was brought by the plaintiff to recover from the defendant damages for the destruction of the plaintiff's barn and its contents, consisting of 17 tons of hay, 14 loads of oats, 8 loads of rye, 3 loads of barley, and several farming utensils, together with 500, rails, set forth in the declaration filed 12th February, 1881, alleging: (1st count.)

"That the defendant had carelessly and negligently set fire to a heap of straw on his, the defendant's, own land; and, by reason of the negligence and carelessness of the defendant, the said fire spread to the * * land of the plaintiff, and burned the barn * * and the goods and chattels of the plaintiff, &c.

The second count alleged that plaintiff and defendant were possessed respectively of certain premises near each other and that—

"One James Black, by the order, instruction, sanction, and permission of the defendant, he, the said James Black, being at the time the servant and agent of the defendant, and in the ordinary and usual course of his employment as such servant set fire to a brush heap on the said land of the defendant for the purpose of clearing a portion of said defendant's land; and the defendant did not use due care to prevent the said fire from spreading, but by reason of the negligence and carelessness of the defendant, the said fire spread to the plaintiff's land and burned his barn, stable, and shed, and a large quantity of the plaintiff's goods and chattels."

The third count alleged that—

"The plaintiff and defendant were possessed respectively of a parcel of land, each situate in the township of Camden, which parcels were then lying and being each near to the other parcel, and the defendant, by himself, his servants, agents, and workmen, had then negligently and carelessly put and placed on the defendant's said parcel of land a fire, which the defendant then negligently and carelessly permitted to continue there to exist, blaze, and burn, and the defendant then took so little and such bad care thereof that by and through the defendant's carelessness and negligence the said fire was permitted to continue to burn, and the same by reason of such carelessness and negligence of the defendant then did run, spread, and burn, and ran to, in, and upon the plaintiff's said parcel, and there, then, by, and through the defendant's negligence and carelessness burned and consumed the plaintiff's barn, stables, and sheds, situate on the plaintiff's said parcel, and then and there burned and consumed the plaintiff's goods and chattels.

The plaintiff claimed \$2,000 damages.

The defendant pleaded to the three counts, not guilty; That the farm, goods, &c., were not the property of the plaintiff: That the farm, barn, &c., were not the property of the plaintiff as alleged: For a fifth plea to the second count, the defendant stated that the said James Black was not the servant of the defendant as alleged: And for a seventh plea to the said third count, that the said farm, barn, &c., were not nor was any of them the property of the plaintiff as alleged. And for an eighth plea to the whole of the declaration, the defendant pleaded that he did what was complained of by the plaintiff's leave.

The cause came on to be heard at the Assizes for Lennox and Addington in the Spring of 1881, before Osler, J., and a jury.

The defendant had been examined before the Judge of the County Court, and proved that he and his man, James

Black, were working in his (defendant's) field on the day the fire occurred, hauling in pease. He further swore :

"I smoked the day I was drawing in pease. I lit my pipe with a match before I went up with the load. I put the match out with my finger and thumb, and threw it down. It may have fallen on the dry grass. When I came back from the barn I found the fire had burnt all round the place where I stood when I lit the match. I don't know how the fire caught. I smoked while I was in the field and a piece after I left the field. Black was on the load and I was pitching on. I suppose after I came back from the barn I could have put out the fire in the elm stump on Saturday. When we found it in the hemlock stumps near the fence we could not put it out. We tried to put it out with water and digging around it. We could have put it out by digging down under it, but we did not think there was any danger. I suppose Furlong's fence was burned. I don't know how much * * I first discovered the fire on Thursday. The place where the fire caught in the field was about 190 rods from the barn. When we left there with the load we did not see any signs of fire. I walked from this to the barn and unloaded in the barn. It was about an hour from the time we left the field until we came back and I saw the fire. There is a pathway running across my field where the fire caught. It is used a great deal by people on foot and horse-back, and it is travelled a great deal, and there could have been a dozen pass there without my seeing them, I think. On Thursday me and my man did not take long to put out the fire and we put it all out except in the stumps. I gathered the loose pieces of fire and put them all by the stumps to burn them up. I was back there on Friday, and the fire was then confined to the stumps. I did not plough around the stumps then. During Thursday, Friday, and Saturday, I was working in the field where the fire was, and I had the stumps under my eye. On Saturday, while we were at dinner, the fire spread and got in the fence from the stumps or other source."

The jury returned a verdict for the defendant.

In Easter Term (May, 1881,) *Meek*, for the plaintiff, moved for a rule *nisi* to set aside the verdict on three grounds, as stated in the judgment.

The Court of Queen's Bench refused the rule, and thereupon the plaintiff appealed to this Court.

The reasons assigned in support of the appeal were, (1) The learned Judge who tried the cause, submitted, in accordance with the Common Law Procedure Act, the following questions to the jury to be answered :

(a) What was the original cause of the fire ? (b) Did the defendant believe the match was extinguished when he threw it down ? (c) Was the defendant guilty of any neg-

ligence in throwing it down after using it? (d) Did the defendant use the reasonable efforts and precautions which a reasonable, prudent man would use in putting out the fire after it had started? (e) What damages is the plaintiff entitled to recover, if any? But the jury refused to answer, and did not answer any of the said questions, and brought in a general verdict for the defendant.

(2) The jury were not authorized or empowered to bring in a general verdict; they had power only to answer the questions submitted to them by the learned Judge. R. S. O. ch. 50, secs. 255, 256, 257, 258, 263, and 264.

(3) It was admitted at the trial, as appears by the evidence, that the defendant had started a fire on his own land, not for any lawful or useful purpose, and the learned Judge should have charged the jury, or should have found and held as a matter of law, (but did not do either), that setting out a fire, not for any lawful or useful purpose, at the season and under the circumstances shewn by the evidence, was in itself an act of negligence on the part of the defendant sufficient to render him liable to the plaintiff for the damage done; the evidence on this point being uncontradicted and conclusive against the defendant: *Ball v. The Grand Trunk R. W. Co.*, 16 C. P. 252; *Gillson v. The North Grey R. W. Co.*, and the cases collected and cited in it, 35 U. C. R. 475.

(4.) It was admitted at the trial, as shewn by the evidence, that the defendant allowed a smouldering fire to exist on his own land, and allowed the said fire to continue to smoulder thereon; and the learned Judge who tried the cause should have found as a matter of law, and should have charged the jury (but did not do either), that the defendant, by allowing a fire to smoulder on his premises at the season, and under the circumstances shewn by the evidence, was guilty of an act of negligence, and thereby rendered himself liable to make good to the plaintiff the damages resulting to the plaintiff therefrom: *Holmes v. The Midland Railway of Canada*, 35 U. C. R. 253.

(5.) That what acts and circumstances constituted negli-

gence on the part of the defendant in the present case was a question of law which should have been determined by the learned Judge, and should have been submitted to the jury for determination: *Addison* on Torts, ed. of 1879, pp. 339, 340, and 341.

(6.) That the defendant by allowing a fire to be started and to continue to smoulder and burn for several days on his own premises, not for the purpose of clearing or any other useful purpose, and which eventually spread to the premises of the plaintiff and burned and destroyed the plaintiff's crops, thereby greatly damaging the plaintiff, was clearly guilty of negligence, and (whether guilty of negligence or not) was clearly liable and accountable, and should have been adjudged to be liable and accountable to the plaintiff for the damage and loss sustained by the plaintiff from said fire: *Addison* on Torts, ed. of 1879, pp. 339, 340, and 341, and the cases there referred to; *Fil-liter v. Phippard*, 11 Q. B. 357; *Vaughan v. Menlove*, 3 Bing. N. C. 468; *Campbell* on Negligence, 627; *Saunders* on Negligence, 335; *Wharton* on Negligence, 866, 867, 873.

In support of the judgment the defendant submitted the following grounds:

(1) That there was no evidence whatever under the first or second counts of the declaration; (2) That the evidence shews that the defendant was not in any way guilty of negligence, either in starting the fire which destroyed the plaintiff's property, or in omitting to make every effort to extinguish the same; (3) That the spread of the fire to the plaintiff's property was in no way due to any carelessness or default of the defendant, but was caused by the sudden rising of the wind; (4) That the fire was not started by the defendant for any unlawful purpose, and in fact was not started by him for any purpose at all, but at most was entirely accidental in its origin; (5) That even if the defendant did start the fire by throwing down a burning match under the circumstances detailed in the evidence, his doing so was in no way illegal, and of itself alone in no way rendered him liable for damage afterwards

arising from the fire so started; (6) That the defendant made every reasonable effort to put out the fire; (7) That the refusal of the rule *nisi* for a new trial in this case was upon matter of discretion only, and no appeal to this Court lies; (8) That no misdirection was complained of at the trial. The plaintiff's counsel did not insist upon the point of misdirection; did not ask to have the jury directed in any particular manner before they retired, and did not, after they had retired to consider their verdict, ask that any particular direction should be given to them; (9) That the learned Judge was not asked to direct the jury as in the second paragraph of the plaintiff's motion paper in the Court below set forth; (10) That even if the learned Judge had been asked so to direct the jury, it would not have been proper for him to have done so in the terms mentioned in the said motion paper; and (11) That it was in the discretion of the learned Judge to allow the jury to render a general verdict for the defendant, notwithstanding he had proposed to ask them to answer questions.

The appeal came on to be argued before this Court, on the 26th of January, 1882.*

Meek, for the appellant.

Bethune, Q. C., and *Deroche*, for the respondent.

The other facts and the points relied on appear in the judgment.

March 24, 1882. PATTERSON, J. A.—The case went to the jury upon the third count only, which charged that the defendant by himself, his servants, agents, and workmen, had negligently and carelessly put and placed on the defendant's land a fire, which the defendant negligently, and carelessly permitted to continue there to exist, blaze and burn, and that by reason of that negligence the fire ran to the plaintiff's farm, and did him damage.

**Present*.—SPRAGGE, C. J., BURTON, PATTERSON, and MORRISON, JJ. A.

If the first count differed at all in effect from the third, it was in being less comprehensive.

The second count charged that the fire had been set to a brush heap on the defendant's land for the purpose of clearing the land, and was by negligence allowed to spread to the plaintiff's land. The great point now made for the plaintiff is, that the fire was not set out for any such purpose as his second count alleges; and it is argued that that circumstance makes the defendant liable, even though he may have been chargeable with no neglect in the management of the fire.

The pleader who drew the declaration certainly had not in his contemplation the precise facts on which the plaintiff now relies. These are that the defendant threw upon the ground, in his own field, a match with which he had been lighting his pipe, without taking care to effectually extinguish the match; that the match falling on combustible material occasioned a fire, which, after burning more or less for four or five days, spread to the plaintiff's land.

There was no direct evidence of the fire having been occasioned by the match; but there was evidence which made it tolerably certain that it must have been so occasioned, and it was not accounted for in any other way.

The case was tried before Osler, J., with a jury. The following are the material passages of the charge to the jury, as reported by the shorthand reporter:—

“The law, as I understand it, upon the question of setting out fire is this: that every man has a right to use his own land in the way that seems best to him, and to do on his land what seems best in his opinion. He must, however, in using his land as he sees fit, and in doing what he thinks proper upon it, take care not to do any injury to his neighbour, so far as he can reasonably avoid it. I do not consider that his right to use fire on his land is at all limited to the purpose of clearing the land. He may use it for any purpose that he pleases, and all that he is bound to do is to use proper precautions that it does not extend to his neighbours. In other words, he is not to set out fire negligently, whatever be the purpose for which he sets it out; if it be for an honest reasonable purpose he does not become an insurer of his neighbour's property against loss. I will submit certain questions to you, and I will ask you to answer them. The case is one which presents no very great conflict of evidence—I may say no

conflict of evidence—on any material point. I have not noticed either of the counsel point out in what respect the defendant's account of what took place was incorrect. In fact, the defendant and Black, his servant, seems to have been the only persons who knew what happened. The first question I shall ask you is, what was the cause of this fire? Smoking is not an unlawful habit. The defendant admits that he was smoking, and he admits that he lighted his pipe with a match, and that he threw the match down after squeezing it. He says he thought it was out when he threw it down. Are you satisfied from the evidence that the cause of the fire was the match, or did it occur from some other cause? I shall then ask you to say whether the defendant believed at the time when he threw the match down that it was extinguished. Upon that you have the defendant's evidence, of which you are the best judges. I shall then ask you to say whether the defendant, in your opinion, was guilty of any negligence in throwing the match down in the way he did after using it. Assuming that the fire started from this match, I shall then ask you to say whether the defendant used the reasonable efforts and precautions which a reasonably prudent man would have taken in putting out the fire after it had started. I do not concur in the statement which was made to you, that the mere act of the defendant in starting the fire—assuming that he did start it himself—was illegal, and that he incurred liability from that mere act. The whole question is, whether what he did or omitted to do was what a reasonably prudent and careful man would have done or omitted to do. Was he acting properly in gathering up these chunks of woods that were burning over the burned space. Would it have been more reasonable that he should have left all these pieces of wood to burn up scattered over this area, or that he should have put water on each of them; or would it have been more reasonable that he should have put them all together and massed the fire into one heap, as he says he did. The result of what he did, according to his evidence—and we have no evidence to the contrary—was that the whole of these pieces were consumed. There is no evidence that there was a high wind then which would be likely to drive the sparks from that so that they would do damage to his neighbour's property. Remember that he was at some distance from his house, and from any other place where he could have got anything to carry water. The only other question which you will have to consider is that of damages."

The learned Judge gave five written questions to the jury, viz: [Stating the question as above set forth.]

The jury did not specifically answer the questions, but gave a general verdict for the defendant, which the Judge accepted and recorded.

Counsel for the plaintiff, after the jury retired and before verdict, submitted, by way of exception to the charge, that where any person places a dangerous element like fire

upon his premises, he is bound at all hazards to look after it: that the only case in which he is protected by the absence of negligence, is that in which he is using the fire for a lawful purpose, such as that of clearing land: that he must have a reasonable excuse for using it; and that where a person allows fire to smoulder on his premises and it afterwards breaks out, he is liable for any injury that may result.

It is now said on the part of the plaintiff, that counsel also objected to the reception of the general verdict, upon the ground that the Judge, after requiring the jury to answer the questions submitted to them, had no power to accept a general verdict.

There is no reference to any such objection as this in the short-hand writer's report or the Judge's notes, and on the part of the defendant it is not admitted that it was made. It is clear, however, and nothing to the contrary is alleged, that no further objection was made; and that while the power to dispense with answers by the jury and to receive the general verdict may have been disputed, it was not urged that the Judge's charge, though delivered with a view to the answering of specific questions, was not sufficiently instructive to enable the jury to deal with the case by giving a general verdict. The charge, as reported, deals with every topic involved in the question of liability. It is obviously a good deal condensed in the report; and it was doubtless understood by the counsel who heard it to be a sufficient charge even for the purpose of a general verdict. Had it been deemed otherwise, the learned Judge would without doubt have supplemented it before accepting the general verdict.

The appeal to this Court is from the refusal of the Court of Queen's Bench to grant a rule *nisi* to set aside the verdict and order a new trial on grounds which are thus stated in the motion paper:

1. That the verdict is against law, evidence, and the weight of evidence.

2. And for misdirection on the part of the learned Judge,

in not charging the jury that setting out a fire without any lawful purpose or excuse is negligence in itself, and that allowing a smouldering fire to exist on his premises by the defendant was also negligence.

3. The jury refused to answer any of the questions submitted to them by the learned Judge at the trial, and the learned Judge had no power to and should not have accepted their general verdict.

The first ground, except so far as it may seem to involve the same objections as the second, appealed only to the discretion of the Court, and is not renewed as a ground of appeal.

The third ground, if open to the plaintiff, must be decided against him. It is founded upon the 264th section of the C. L. P. Act, R. S. O. ch. 50, which enacts that, except in certain actions, the Judge, instead of directing the jury to give either a general or special verdict, may direct the jury to answer any questions of fact stated to them by the Judge for the purpose; and in such case the jury shall answer such questions and shall not give any verdict; and on the finding of the jury upon the questions which they answer, the Judge shall enter the verdict.

This, no doubt, makes it imperative upon the jury to obey the Judge's direction, and prohibits them from rendering a verdict in place of answering questions when he directs them to answer questions in place of giving a verdict. But it does not so fetter the discretion of the Judge that, having directed one mode of proceeding, he may not, if he sees reason to do so, recall that direction and adopt the other mode. Whether this happens to be done of his own motion, or at the suggestion of counsel or of the jury, can make no difference. It will often be the case, that a charge given for the purpose of merely assisting the jury to answer questions of fact, to which the Judge is afterwards to apply the law, will be less comprehensive than one delivered with a view to a general verdict. There are cases also which a Judge may think can only be satisfactorily dealt with by the jury answering specific

questions. Most actions for negligence come, in my opinion, within this class. The charge being that the defendant has failed in the performance of some duty towards the plaintiff, the duty has to be ascertained, either as a conclusion of fact or of law. And it is usually desirable to know specifically the particulars in which, in the opinion of the jury, default has been made. What do they find that under the circumstances the defendant is chargeable with having improperly done or omitted? Such considerations as these will, of course, weigh with the Judge in exercising the discretion vested in him; but they do not touch the question now raised, viz., the existence of the discretionary power.

The other objection involves more difficulty.

The learned Judge laid down certain propositions of law which, as applied to fires kindled for the purpose of, clearing land, or for a purpose necessary in the ordinary use and enjoyment of land, have long been well settled and are quite beyond dispute. The leading case on the subject in our own Courts is *Dean v. McCarty*, 2 U. C. R. 448, and the doctrine is illustrated by many other cases, of which I may mention *Buchanan v. Young* 23 C. P. 101; and *Gillson v. North Grey R. W. Co.* 33 U. C. R. 128, 35 U. C. R. 475.

The main question is, whether that doctrine was correctly applied to the facts of this case.

It will be useful to refer for a moment to those facts as, for our present purpose, we may take them to be shewn by the evidence.

On Thursday, 2nd September, 1880, the defendant was working at his harvest. He and his man loaded a load of peas. The defendant walked from the field to the barn, the man following with the load. Before leaving the field the defendant lighted his pipe with a match and threw the match on the ground, first squeezing it with his fingers, and supposing it was out. Before reaching the barn the man saw smoke arise from near the place where the peas had been loaded, but did not mention that to the defen-

dant. After unloading the pease the defendant returned to the field to continue his harvest work, and found that the dry grass had been on fire, and had burned over a considerable space and set fire to some pease and oats, and had also set on fire an elm stump and chips and pieces of wood. He did what he could to put out the fire by using a bush, and did put it out where it was burning his crops. He did not attempt to extinguish the stump or the chips, but gathered the burning chips, or "chunks of wood," round the stump and left them to burn out, considering that a good way to deal with them, and supposing that, as he and his man were to be working in the field, they could watch the fire and prevent it doing more harm. There was a creek at a small distance, with plenty of water, with which the fire might have been extinguished, but the defendant had nothing at hand with which to carry water, and imagined that it would do well enough to let the fire burn out. Upon that Thursday evening the fire was still confined to the stump or its roots, and the same on the Friday, and, to all appearances, on Saturday morning. But on Saturday it spread, by running along the ground, or, perhaps being blown by a light wind which there was, and set fire to a fence of the defendant's. The fence was pulled down, and the defendant dug round the fire and carried water, and supposed he had by those means put out the fire. In this he was mistaken. On Sunday a hemlock stump near the burnt fence was found to be on fire. The defendant exerted himself to put this fire out, by digging about it and carrying water, both on the Sunday and the Monday, but his efforts were not successful, probably by reason of a wind which sprang up and carried the fire to the plaintiff's farm, where it burned his barns and crops, and did other damage. The season is described as "a dry time," though it is also said that there was some rain on Friday or Saturday.

This narrative shews several points in which this case differs from the ordinary one of fire employed for the purpose of clearing land. I may have to notice these points

more particularly, but will first refer to the law as gathered from some of the authorities.

We find a statement of the law under the custom of England, in *Comyn's Dig., Action on the Case for Negligence*, (A 6); and in *Viner's Abridgement, Action* (B.) By that law a man in whose house a fire originated, though by no act or fault of his, and even if it were accidental, was liable for whatever damage it caused to the house or goods of another. The authority cited for this is 2 Hen. 4, 18.

The case thus referred to, is *Beaulieu v. Finglam*, in which the duty charged was to safely and securely keep his fire so that no damage should happen from it to his neighbors. The breach of duty was negligently keeping his fire, so that damage was done.

The force of the words, "safely and securely," was discussed in a case of *Ross v. Hill*, 2 C. B. 877, with reference to the duty of a carrier to "safely and securely keep" the goods entrusted to him. Some cases from the old books are referred to by Tindal, C. J., in his judgment, as showing that the duty *salvo et secure*, &c., is sometimes expressed in words which, if strictly construed, would throw upon the party charged a larger burden than the ordinary degree of care which the law requires; and *Beaulieu v. Finglam*, is cited by the reporter in a note, as containing a still more stringent expression of the rule than the cases referred to by the Chief Justice. The decision in *Ross v. Hill*, was that the undertaking charged in that declaration "safely and securely to convey the plaintiff," &c., meant no more than safely and securely with reference to the degree of care which, under the circumstances, the law required of the defendant; that is, that he should use such a reasonable degree of care that the plaintiff should incur no damage or loss through the defendant's negligence or default. The Chief Justice does not cite *Beaulieu v. Finglam*, but he does refer to a precedent in *Rustell*, where the defendant is charged in case for negligently keeping a fire, and where the duty is laid in almost the

same words as in the case in the year-book ; and he says of it that it certainly extends the duty beyond the degree of care that the law requires. If by this he intended to refer to the law as it stood at the early date at which that precedent was framed, I apprehend he can only have had in his mind the modification of the rule enunciated in *Turbervill v. Stamp*, which is reported in 1 Salk. 13, and in 12 Mod., and several other reports, and the effect of which is given in *Comyn's Dig.* and *Viner's Abridgement* at the places already noted. That case formed the ground work of the decision in *Dean v. McCarty*. The passages from *Comyn's Dig.* are quoted in the judgment, at p. 450, where one of them is curiously misprinted. They are as follows : " So an action on the case lies * * if a fire be kindled in a yard or close, to burn stubble, and by negligence it burns corn, &c., in an adjoining close. * * So it lies not if it appear that a fire lighted for the burning of stubble, &c., by a sudden wind or other inevitable accident, without the fault of the defendant or his servants, burns the corn of another."

The "Custom of England" seems to be synonymous with the common law. In *Vin. Abr.*, Action (B. 4.) there is this citation : " In case for not well keeping his fire, by which he burnt the houses of the defendant and of the plaintiff. The count was *according to the custom of the kingdom of England, that he ought so to keep his fire, &c.* And exception taken of this custom, because *it is not declared where it is used ; et non allocatur*, because *the custom of the kingdom is the common law of the kingdom.*"

And a similar statement is contained in an anonymous case in *Cro. Eliz.* at p. 10, the facts of which case seem not to differ in essence from those before us. The note runs thus : " Snagg moved this case, and demanded the opinion of the Judges on it. J. S. with a gun, at the door of his house, shoots at a fowl, and by this fireth his own house and the house of his neighbour ; upon which he brings an action on the case generally, and doth not declare on the custom of the realm, as 2 H. 4, viz., for negligently keeping

his fire. The question was, if this action doth lie? And the Court held it did; for the injury is the same, although this mischance was not by common negligence, but by a mis-adventure; and if he had counted upon the custom of the realm, as 2 H. 4, the action would not have been well brought: yet *consuetudo regni est communis lex*."

The law respecting liability for torts in general is thus stated by Sir T. Raymond in his report of *Lambert v. Bessey*, p. 422, which was decided in Hil. 32 & 33 Car. 2: "In all civil cases the law doth not so much regard the intent of the actor as the loss and damage of the party suffering; * * for though a man doth a lawful thing, yet if damage do hereby befall another he shall answer for it if he could have avoided it." And the report illustrates these propositions by a number of instances in which a defendant had been held answerable for the consequences of an act done *ipso invito*, or *casualiter et per infortunium, et contra voluntatem suam*.

These older authorities establish that, at common law, while a man was liable to make compensation for whatever injury he caused to another, whether by fire or by any other means, his liability in case of fire was greater than in other cases; because, by the custom of the realm, if a fire occurred in his house or his field, he was bound to control it so as to prevent damage to his neighbour, even though he had himself no part in causing the fire. This last proposition is certainly true of fires occurring in a house. I am not so clear that *Turbervill v. Stamp* extends the doctrine to a fire in a field which is not made by the owner or his servants.

The liability is qualified only when, the fire being kindled for a lawful purpose, some *vis major* intervenes, as held in *Turbervill v. Stamp*; or when, as put by Sir T. Raymond in his report, the defendant could not have avoided the casualty.

The wide liability thus existing at common law was modified by the Statute 6 Anne, ch. 31, sec. 6, so far as it attached to a fire occurring in a house or chamber. That

Act was repealed by 14 Geo. III. ch. 78, sec. 101, and sec. 6 was replaced by sec. 86 of the Act of Geo. which declared that no action, suit, or process whatsoever, shall be had, maintained, or prosecuted against any person in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall accidentally begin, nor shall any recompense be made by such person for any damage suffered thereby, any law, usage, or custom to the contrary notwithstanding.

In *Dean v. McCarty*, the Chief Justice, referring to these statutes, seems to have thought that they were intended to exempt persons from answering in damages for injuries occasioned to others, even when there had been a want of care. In *Filliter v. Phippard*, 11 Q. B. 347, which was decided a year or two later than *Dean v. McCarty*, it was considered that a fire could not both begin accidentally and be the result of negligence; and, finding the word *accidental* used in statutes which do not speak of wilful fires, but make an important provision for such as are accidental, and considering how great a change in the law would be effected by a different construction, and how great encouragement would be given to that carelessness of which masters may be guilty as well as servants, the Court held the more reasonable construction of an accidental fire, within the meaning of the statute, to be one produced by mere chance, or incapable of being traced to any cause, and so opposed to the negligence of either servants or masters. But in *Gaston v. Wald*, 19 U. C. R. 586, it was held, Robinson, C. J., delivering the judgment, that the fire then in question was accidental, and the defendant protected by the statute, notwithstanding that the jury found that he had been guilty of negligence. In that case fire had been left in a stove in the defendant's butcher shop, and had burnt through the floor into the plaintiff's cellar below the defendant's shop. It seemed to have been caused by the ignition of a chopping block of the defendant's which had been allowed to stand very near the stove.

The contention for the plaintiff in *Dean v. McCarty* was that the act of the defendant, who had kindled a fire in his own field in order to clear his land, was of such a nature as made him responsible for the consequences, as it might have been prevented; and that he was bound to protect his neighbour's property from any injurious consequences from the fire which he had kindled for purposes which were beneficial to himself.

In delivering the judgment of the Court, Sir J. B. Robinson, referring to the necessity for burning the wood upon the ground, as a necessary part of the operation of clearing, said: "To hold that what is so indispensable not merely to individual interests but to the public good must be done wholly at the risk of the party doing it, without allowance for any casualties which the act of God may occasion, and which no human care could certainly prevent, would be to depart from a principle which in other necessary business of mankind is plainly settled and always upheld. If it could be shewn that this business of clearing land could, by means which we can suppose to be within the reach of those employed in it, be done at a time or in a manner that would make it wholly independent of any accident within the control of the party, then, perhaps the bare fact of not having taken those certain means, might be held to constitute negligence; in which case the liability for damages would always, as a matter of course, follow the injury. But as we cannot, I think, venture to hold that there are any certain means of avoiding such accidents, it must in each case be a question of fact for the jury, whether the defendant has any negligence to answer for or not."

His lordship then commented upon the case of *Turber-vill v. Stamp*, pointing out that the objection urged in that case was that the plaintiff relied upon the custom of the nation as supplying the presumption of negligence from the mere occurrence of the accident, and when there might in fact have been no negligence; in short, that it placed the defendant on the same footing in that respect as a

common carrier. And he quoted from the report in 12 Mod. the opinions of the Judges thus: "Turton, Justice, observed, 'There is a difference between fire in a man's house and in the field; in some counties it is a necessary part of husbandry to make fire in the ground, and some unavoidable accident may carry it into a neighbour's ground, and do injury there; and this fire, not being so properly in his custody as the fire in his house, I think this is not actionable as it is laid.' But by Holt, C. J., and the other Judges, 'Every man must so use his own as not to injure another. The law is general; the fire which a man makes in his fields is as much his fire as his fire in his house; it is made on his grounds, with his materials, and by his order; and he must at his peril take care that it does not, through his neglect, injure his neighbour. If he kindle it at a proper time and place, and the violence of the wind carry it into his neighbour's ground, and prejudice him, this is fit to be given in evidence. But now here it is found to have been by his negligence, and it is the same as if it had been in his house.' This," his lordship adds, "contains all the doctrine under consideration. We cannot distinguish the case from the one before us."

These principles have governed all the subsequent decisions in our Courts, and I believe all similar cases in the English Courts. In judging of the care or negligence of the defendant his conduct in the management of his fire has necessarily formed an important part of the inquiry; but the inquiry has always gone farther back. The time and circumstances in which the fire was set out, the state of the wind and weather, the probability which may have been apparent of a continuance of suitable weather, the condition of the ground, the proximity of combustible matter or of crops or buildings, and the likelihood of whatever breeze there may have been carrying fire in a direction where damage must ensue from it, and other matters serving as criteria of the prudence of setting out fire at the particular time and in the particular spot have properly entered into the investigation. Negligence in these par-

ticulars has always been held to render the landowner liable, notwithstanding that he may have omitted no exertion to control the fire when once started.

It cannot be taken for granted that the jury would have considered it justifiable, even for the purpose of husbandry, to have selected the time when the fire in question was caused for making a fire in that particular locality. At all events, the propriety of so doing would have been a necessary inquiry. To dispense with it in a case like the present would be to accord to a person who endangers his neighbour's property by unnecessarily kindling a fire upon his own a degree of immunity greater than that extended to a man who uses fire only for the necessary purpose of bringing his farm into cultivation. Yet, where the fire has not been intentionally set, it would seem out of place. One cannot readily imagine a case of the kind where such an inquiry would be relevant.

It would be necessary to extend the rule settled by *Dean v. McCarty* farther than the principle on which it rests would warrant, before it could be applied to a case in which the fundamental fact, viz., the necessity for making the fire, was wanting. But, if the initial dissimilarity of the two classes of cases be passed over and attention given to after events, it will still be found that different criteria of negligence must be applied. In the one class, the fire being used as an instrument of husbandry, the object is to manage and direct, and even extend it, that it may do its work effectually. In the other, the fire is merely an aggressor, and prudence requires its suppression.

As an illustration, take the position of matters in this case on the Thursday or Friday when the fire was confined to one stump, and, as there is evidence to shew, could easily have been extinguished by a few pailfuls of water from the creek. In a case like *Dean v. McCarty* the duty of the landowner would not have been to extinguish the fire, but merely to use diligence to keep it within bounds. Or, more properly, his duty to his neighbour would have been to use all reasonable efforts, short of putting out the

fire, to keep him from injury. In the other case the duty was to prevent the injury. The most effectual way to do this was to put out the fire. So the defendant himself thought, as shewn by the efforts he made in that direction. But his default would not be excused by the circumstance that to procure pails and carry water would have involved some labour and some delay of the harvest work, or by the hope, which proved unfounded, that the fire would burn itself out without extending.

The cases, which, in recent times, have become rather numerous, arising from fires caused by railway engines, afford illustrations of the application of the doctrines we are considering.

In *Vaughan v. Taff Vale R. W. Co.*, 3 H. & N. 743, the Court of Exchequer held the defendants liable for damage caused by sparks from their engine, notwithstanding that there was no negligence in the construction or use of it, on the ground that as they used an instrument likely to produce damage, and producing it, they must bear the consequences. This decision was reversed in the Exchequer Chamber, 5 H. & N. 679, that Court holding that a railway company, authorized by law to use locomotive engines, could not, in the absence of negligence, be held liable for injuries occasioned by sparks escaping from the engine. The rule thus laid down has ever since been followed, and is firmly established. It has never, so far as I am aware, been questioned, except by Mr. Justice Bramwell who delivered the judgment of the Court of Exchequer, and who, ten or eleven years later, in delivering his opinion to the House of Lords in *Hammersmith R. W. Co. v. Brand*, L. R. 4 H. L. 188, adhered to his former view. The House of Lords approved of the decision of the Exchequer Chamber. I understand this rule to place the liability, in a case where there is express legislative authority for the use of fire, upon the same footing as in the case of fire used for the necessary purposes of husbandry. The negligence which will, under this rule, render a company liable, may consist, as in *Piggott v. Eastern Counties R. W. Co.*, 3 C.

B. 229, in not using the most effectual contrivances or means which are known for preventing as far as possible the emission of sparks, even though for that purpose it should be necessary to use engines of greater power than would otherwise be required; or it may consist in allowing combustible matter to lie upon the railway grounds, which, being ignited by fire from the engine, occasions the damage. This was the case in *Smith v. London and South Western R. W. Co.*, L. R. 5 C. P. 98; and also in *Vaughan v. Taff Vale R. W. Co.* Cases of both kinds may also be found in our own reports. I may refer to *Jaffrey v. Toronto, Grey, and Bruce R. W. Co.*, 23 C. P. 553, as containing an instructive judgment by Hagarty, C. J.

The point to be noted, as shown by this class of cases, as touching our present purpose, is that in the absence of legislative authority for the use of fire the common law liability for all damage done exists.

The case of *Fletcher v. Rylands*, 3 H. & C. 774; L. R. 1 Ex. 265; L. R. 3 H. L. 330; was much relied on for the plaintiff. The decision is clearly stated in the head note of the report in 3 H. L. as follows: "Where the owner of land, without wilfulness or negligence, uses his land in the ordinary manner of its use, though mischief, should thereby be occasioned to his neighbour, he will not be liable in damages. But if he brings upon his land any thing which would not naturally come upon it, and which is in itself dangerous, and may become mischievous if not kept under proper control, though in so doing he may act without personal wilfulness or negligence, he will be liable in damages for any mischief thereby occasioned." The principle of the decision is explained in the following extract from the judgment of Lord Cranworth: "In considering whether a defendant is liable to a plaintiff for damages which the plaintiff may have sustained, the question in general is not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage. This is all well explained in the old case of *Lambert v. Bessey*, reported by Sir Thomas Raymond, and

the doctrine is founded on good sense. For when one person in managing his own affairs causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound *sic uti suo ut non lædat alienum*. This is the principle of law applicable to cases like the present, and I do not discover in the authorities which were cited anything conflicting with it."

The dangerous thing which the defendants in *Fletcher v. Rylands* had brought upon their land was water stored in a reservoir for the purposes of a mill; and it damaged the plaintiff by escaping into his mine by some old shafts, the existence of which had been unknown to the plaintiff.

The House of Lords, in disposing of the case, virtually adopted the judgment of Blackburn, J., delivered in the Exchequer Chamber. Referring to that judgment, Richards, C.J., remarked, in *Gillson v. North Grey R. W. Co.*, 33 U. C. R. at p. 147, that much of the reasoning in it would apply to fire as one of the things which, if a man brings on his land, he is bound to see does no harm to his neighbour. The accuracy of that observation is fully borne out by the case of *Jones v. Festiniog R. W. Co.* L. R. 3 Q. B. 733. In giving judgment in that case Blackburn, J., said: "The general rule of common law is correctly given in *Fletcher v. Rylands*, that when a man brings or uses a thing of a dangerous nature on his own land he must keep it in at his own peril, and is liable for the consequences if it escapes and does injury to his neighbour. Here the defendants were using a locomotive engine with no express parliamentary power making lawful that use, and they are therefore at common law bound to keep the engines from doing injury; and if the sparks escape and cause damage, the defendants are liable for the consequences, though no actual negligence be shewn on their part." And Lush, J., said: "I can see nothing in this statute to license the company to use locomotive engines. In the absence of this license the company are left to their liabilities at common law; that is, if they use a highly dangerous machine, they must do so at the peril of the consequences if it cause injury to

others. The case of *Fletcher v. Rylands*, and the authorities referred to in Com. Dig. tit. Action upon the case for negligence (A. 6) illustrate this principle."

In *Jones v. Festiniog R. W. Co.*, the fire was caused by sparks being blown directly from the engine to the plaintiff's hay-stack. There is scarcely room for a suggestion that the rule of liability would have been different if they had set fire to something on the land of the company, and from that the fire had communicated to the plaintiff's property. It happens, however, that the immateriality of the fact whether the fire reached the plaintiff's property mediately or immediately appears from the judgment of the Exchequer in *Vaughan v. Taff Vale R. W. Co.*, 3 H. & N. 743, which, though overruled upon the ground that the legislative permission to use locomotive engines relieved the company from the common law liability for all damage done, may yet be taken as an authoritative statement of the law in cases like *Jones v. Festiniog R. W. Co.*, where no such sanction has been given. The facts are thus summarized by Bramwell, B.: "That the defendants' line passed in a cutting by the side of the plaintiff's wood: that on the side of the cutting was tall dry grass of very combustible character, extending to the plaintiff's wood: that the defendants used a locomotive, and did, in consequence of the use of it, burn down the plaintiff's wood; but whether by first setting fire to the grass on their own land, or by throwing lighted matter on the plaintiff's land, was not determined by the jury, though there is great probability that the former was the way in which the mischief was done."

I am unable to distinguish the case before us in principle from *Jones v. Festiniog R. W. Co.*, or to see why the doctrine on which *Fletcher v. Rylands* was decided, which is the same as that deducible from the early authorities, does not govern it.

It has not been contended before us that the defendant can claim exemption from responsibility under the statute 14 Geo. III. c. 78. In one of the printed reasons against the

appeal it is stated that the fire was accidental; but I do not understand what is said as intended to call attention to the statute. I do not doubt that the able counsel who argued the appeal for the defendant would have founded an argument on the statute, if such an argument had seemed tenable. I allude to the subject principally because it necessarily comes before one's attention in considering the law relating to damages occasioned by fire, and because it has been noticed in some of the cases to which I have alluded, and in others at which I have looked, *e. g.* *McCallum v. Grand Trunk R. W. Co.* 31 U. C. R. 527.

It could not, in my opinion, have been contended with much force that the statute applies to circumstances like those before us. I think it would be out of the question to hold this to have been an accidental fire. If combustible materials ignite when fire is allowed to fall upon them, the ignition is not accidental. The falling of the fire in this case was either caused by the act or the negligence of the defendant.

It may be easy to understand how, by force of habit, a man, after lighting his pipe, may throw away the match he has used without giving heed to where it falls, and without being careful to ascertain that it is out, or to do more by way of extinguishing it than some habitual act, such as squeezing it with his fingers, which may or may not be effectual, and perhaps without caring or thinking whether fire may not already have fallen from it. In other words, we can understand that a man may be habitually thoughtless and careless. But it is hard to conceive how one who throws down a match which he has lighted while it is still alight, or who allows fire to fall from it, can do so without doing it either wilfully or negligently.

I have already noticed how the statute was referred to or cited in *Dean v. McCarty*, *Filliter v. Phippard* and *Gaston v. Wald*. If the question should again arise upon facts similar to those in the last named case, I should desire to consider the matter carefully, after full discussion before following that decision, opposed as I think it is to *Filliter*

v. *Phippard*, although a distinction was pointed out between the cases in the judgment.

In *Vaughan v. Taff Vale Ry. Co.* 3 H. & N. 743, the question arose under circumstances which, if I am right in the views I have attempted to express, resembled those in the present case, and was disposed of by the observation made by Bramwell, B. (at p. 75.): "We are of opinion that the statute does not apply where the fire originates in the use of a dangerous instrument knowingly used by the owner of the land in which the fire breaks out." This opinion, which I unhesitatingly adopt, would be decisive against the application of the statute in favour of the present defendant.

If I may venture an opinion upon a statute with respect to which we find so little in the books approaching a general definition of its terms, I should say that the key to the meaning of "*accidentally begin*," will be found by considering the peculiarity of the law respecting fires, under the ancient custom of England.

With regard to torts in general, the liability of a person was limited to the acts or default of himself or of those for whom he was responsible. With regard to injuries done by fire, there was the exceptional liability, as shewn by the case in the Year-Book, 2 Hen. 4, for any fire which began in one's house. The statute of Anne seems to have been designed to strike at this exceptional liability, and to place the responsibility for fire in one's house or chamber, on the same footing as that which attached to injuries from any other cause. It had, however, been held on the authority of *Turbervill v. Stamp*, that the custom of the realm extended to fires in your field as well as to those in your house. And the Statute 14 Geo. III., which in other respects adopted the language of the Statute of Anne, extended the exemption to fires occurring in one's barn, stable, or other building, or on one's estate. I take the policy of both acts to be the same, and that in neither of them was there a design to reduce the responsibility for injuries caused by fire below that which existed with

respect to torts of other kinds ; that, in short, it was the exceptional and not the ordinary liability which was intended to be done away with.

I am of opinion that the defendant must be held liable for the damage which he caused, and that we should allow the appeal with costs, and order the issue of a rule absolute for a new trial without costs.

SPRAGGE, C. J.—I have had the opportunity of perusing the very able judgment of my brother Patterson which he has just delivered ; and while saying that I fully concur in the conclusion at which he has arrived, I desire to add that I thoroughly agree with, and approve of the principles which, throughout the entire judgment, he has so clearly enunciated.

BURTON and MORRISON, JJ.A., concurred.

NEILL V. UNION MUTUAL LIFE INSURANCE COMPANY.

Life policy—Overdue premium—Payment—Forfeiture of policy—Waiver of forfeiture.

By a policy of insurance upon the life of J. N. it was stipulated that if any premium should not be paid when due, the consideration of the contract should be deemed to have failed, and the company released from liability. By another clause, if an overdue premium was received, it was to be upon the express condition that the assured was in good health, &c., and if the fact were otherwise, the policy should not be put in force by such receipt. A cheque was given for a quarterly premium, with the request to hold it for a few days, as there were not then funds, which was received by the agent but the premium receipt was not given up. It was afterwards presented but not accepted. On the 21st October, funds were provided, but it being then after banking hours, the cheque was not presented. That night J. N. was killed. *Held*, affirming the decision of the Court below (45 U. C. R. 593), that the policy lapsed the day after the premium fell due; that nothing but payment could then revive the policy, and that there was not any evidence of payment, or of anything dispensing with it.

THIS was an appeal by the plaintiff from the judgment of the Court of Queen's Bench. The action was brought to recover the amount of a policy dated the 8th day of May, 1877, effected on the life of John Neill, for \$5,000, subject to the payment of \$73.26, on the 10th day of May, August, November, and February, in each year during the continuance of such policy.

One of the provisions indorsed on the policy and referred to in it, was as follows:

"PROVISIONS FOR PAYMENT OF PREMIUMS.—All premiums are due at the office of the company in the city of Augusta, at the date named in the policy, but at the pleasure of the company suitable persons may be authorized to receive such payments at other places, but only on the production of the company's receipt therefor signed by the president or secretary. No payment made to any person, except in exchange for such receipt, will be recognized by the company, or be deemed by either party as valid payment. If for any reason a premium is received after it becomes due, it is upon the express condition that the party whose life is thereby insured is, at the time of the receipt of such premium, in good health, and of correct, sober, and temperate habits; and if the fact is otherwise, the policy shall not be put in force by such receipt. And such receipt must, in every case, be understood by the parties as an act

of courtesy on the part of the company, and in no case whatever as constituting any obligation on its part to waive the payment of a future premium when due. In case any note, cheque, or draft given towards the payment of any premium shall not be paid at maturity, this policy lapses in the same manner as upon the non-payment of the premium when due."

The premium payable on the 10th August, 1879, was not paid. On the 24th September, a cheque was given for the amount, but was not paid on being presented at the bank, for want of funds. This was held over by the agent of the company who was informed on the 21st October that there were funds to meet it. This information was given at or about the hour for the bank closing, when the clerk to whom such information was given, said, "I had better leave it over until morning, and go at 10 o'clock." The renewal receipt was retained in the office of the company. That evening the insured met with an accident which caused his death, and the company then refused to pay the policy, and thereupon the action was instituted by the plaintiff as executor of the deceased.

The jury found a verdict for the plaintiff which, in Hilary Term, 1881, was set aside, and a nonsuit directed to be entered as reported 45 U. C. R. 593.

The appeal came on to be argued 8th February, 1882.*

S. H. Blake, Q. C., and *G. H. Watson*, for the appellant. The question of waiver of conditions in the policy is for the jury, and they having found upon the evidence that there was a waiver of the condition of payment of the premium due on the 10th August, 1879, their verdict was conclusive, and a nonsuit should not have been directed. One of the conditions in the policy being that "if any premium or instalment of premium on this policy shall not be paid when due, the consideration of this contract shall be deemed to have failed, and the company shall be released from liability, and the only evidence of payment shall be the receipt of the company, signed by the president or

Present—SPRAGGE, C.J., BURTON, PATTERSON, J.J.A., and GALT, J.C.P.

secretary," could be waived by the company, and the same was waived by the acceptance and retention by the general agent of the company until the death of the assured, of a cheque for the amount of the premium falling due on the 10th August, and the company having treated the policy as in force up to the time of the death of the assured, were estopped from denying their liability thereon; and the evidence also shews that the defendants were aware of the practice of their general agent to grant indulgences to policy-holders, which they did not disapprove of, but on the contrary, they sanctioned and ratified such practice. They also contended that to work a forfeiture for non-payment of the premium on the day appointed, it was necessary that the company should have declared the policy forfeited, and which was not done; on the contrary, the conduct of the general agent of the company was such as to give a totally different impression, which had been acted upon by the assured; and from the condition in the policy, "In case any note, cheque, or draft, given towards the payment of any premium, shall not be paid at maturity, this policy lapses in the same manner as upon the non-payment of the premiums when due," it was evident the company authorized the acceptance of cheques in payment of premiums, and, in this case, the agent, by receiving and keeping the cheque, postponed and extended the period of payment for the premium due on the 10th of August until after the death of the assured.

Here it was shewn that there were funds in the bank to the credit of the drawers of the cheque on the 21st of October, the day of the death of the assured, sufficient to pay the cheque, and the application by the company's agent for payment of the premium, and the retention of the cheque on that day, was the same as if the assured had then given him a new cheque, which would have operated as payment.

C. Robinson, Q. C., and Mulock, for the respondents. The policy in this case provides that none of its terms can be modified, nor any forfeiture under it waived, except by

of courtesy on the part of the company, and in no case whatever as constituting any obligation on its part to waive the payment of a future premium when due. In case any note, cheque, or draft given towards the payment of any premium shall not be paid at maturity, this policy lapses in the same manner as upon the non-payment of the premium when due."

The premium payable on the 10th August, 1879, was not paid. On the 24th September, a cheque was given for the amount, but was not paid on being presented at the bank, for want of funds. This was held over by the agent of the company who was informed on the 21st October that there were funds to meet it. This information was given at or about the hour for the bank closing, when the clerk to whom such information was given, said, "I had better leave it over until morning, and go at 10 o'clock." The renewal receipt was retained in the office of the company. That evening the insured met with an accident which caused his death, and the company then refused to pay the policy, and thereupon the action was instituted by the plaintiff as executor of the deceased.

The jury found a verdict for the plaintiff which, in Hilary Term, 1881, was set aside, and a nonsuit directed to be entered as reported 45 U. C. R. 593.

The appeal came on to be argued 8th February, 1882.*

S. H. Blake, Q. C., and *G. H. Watson*, for the appellant. The question of waiver of conditions in the policy is for the jury, and they having found upon the evidence that there was a waiver of the condition of payment of the premium due on the 10th August, 1879, their verdict was conclusive, and a nonsuit should not have been directed. One of the conditions in the policy being that "if any premium or instalment of premium on this policy shall not be paid when due, the consideration of this contract shall be deemed to have failed, and the company shall be released from liability, and the only evidence of payment shall be the receipt of the company, signed by the president or

Present—SPRAGGE, C.J., BURTON, PATTERSON, JJ.A., and GALT, J.C.P.

secretary," could be waived by the company, and the same was waived by the acceptance and retention by the general agent of the company until the death of the assured, of a cheque for the amount of the premium falling due on the 10th August, and the company having treated the policy as in force up to the time of the death of the assured, were estopped from denying their liability thereon; and the evidence also shews that the defendants were aware of the practice of their general agent to grant indulgences to policy-holders, which they did not disapprove of, but on the contrary, they sanctioned and ratified such practice. They also contended that to work a forfeiture for non-payment of the premium on the day appointed, it was necessary that the company should have declared the policy forfeited, and which was not done; on the contrary, the conduct of the general agent of the company was such as to give a totally different impression, which had been acted upon by the assured; and from the condition in the policy, "In case any note, cheque, or draft, given towards the payment of any premium, shall not be paid at maturity, this policy lapses in the same manner as upon the non-payment of the premiums when due," it was evident the company authorized the acceptance of cheques in payment of premiums, and, in this case, the agent, by receiving and keeping the cheque, postponed and extended the period of payment for the premium due on the 10th of August until after the death of the assured.

Here it was shewn that there were funds in the bank to the credit of the drawers of the cheque on the 21st of October, the day of the death of the assured, sufficient to pay the cheque, and the application by the company's agent for payment of the premium, and the retention of the cheque on that day, was the same as if the assured had then given him a new cheque, which would have operated as payment.

C. Robinson, Q. C., and Mulock, for the respondents. The policy in this case provides that none of its terms can be modified, nor any forfeiture under it waived, except by

an agreement in writing, signed by the president or secretary of the company, whose authority for this purpose can not be delegated, and it declares that the contract between the parties thereto is completely set forth in the policy and application therefor taken together, and to this the assured assented; and the agreement under which the agent was employed by the company expressly limits his authority as follows: "And that the said agent has no authority on behalf of the said company to make, alter, or discharge any contract, nor waive any forfeiture, nor incur any liability or debt against said company, nor receive any moneys due or to become due to said company, except on policies and renewal receipts (signed by an officer of said company)." He was not, therefore, as regards the insured, a general agent of the company, having all the powers implied from such appointment. The question of waiver was not under the circumstances one for the jury, for there was no evidence of waiver by any one authorized to bind the company, and the avoidance of the policy, in the absence of such waiver, was clearly proved. In addition to the cases cited in the Court below, *Carroll v. Charter*, 1 Abb. 318; *Halllock v. Commercial Ins. Co.*, 2 Dutch. N. J., 268, were referred to.

March 24th, 1882. BURTON, J. A.—The policy under which the plaintiff claims was on condition of the payment of a premium of \$73.26, quarterly, on the 10th days of May, August, November, and February, in every year.

It provided that if any premium, or instalment of a premium, should not be paid when due, the consideration for the contract "shall be deemed to have failed, and the company shall be released from liability, and the only evidence of payment shall be the receipt of the company signed by the president and secretary."

The conditions indorsed upon the policy comprised the following in reference to the payment of premiums: [His Lordship read the provision above set forth.]

The latter part of this condition in reference to notes

appears to be explained by the agent as applying to a form of policy at one time in use by the company when they accepted a part of the premium by note, a practice which had been abandoned; but the condition evidently contemplates a discretion being exercised by the agent in accepting the premium after due if accompanied by a certificate that the assured was still in good health, but it creates no obligation on the part of the company to accept payment of a premium after it falls due.

The policy further provides that the contract between the parties is completely set forth in it and the application for it, taken together, and that none of its items can be modified, nor any forfeiture under it waived except by an agreement in writing signed by the president and secretary, whose authority for this purpose it is declared shall not be delegated.

The provision as to the payment of premiums is also indorsed upon each receipt, and the attention of the assured especially called to it.

The company have been particularly careful in limiting and defining the powers and duties of their agents, and have in the policy called attention of assurers to the fact that such powers are limited, and that they have no power in any case to waive a forfeiture save in the case of the acceptance of a premium where the assured's health is shewn to be satisfactory.

The assured in the present case failed to make due payment on the 10th August, he was killed by an accident on the 21st of October following.

The policy was void on the morning of the 11th August; did anything occur in the interval between that day and the death to revive it?

Assuming that an agent of a foreign corporation doing business in this country and appointed to receive premiums, must be regarded in the same light as the company themselves as contended for in the first reason of appeal, (and I should require further argument and consideration before I fully committed myself to such an

opinion), it is quite clear that the company can prevent any such result by the terms of their contracts, and it seems to me as I have already remarked that they have endeavoured in the most open and business-like manner to guard against any misconception in this respect, but assuming for the moment that the agent can be regarded as having plenary powers upon what can the plaintiff rely here as a waiver of the forfeiture.

If after the default the assured had given a cheque to the agent as payment, when in fact there were no funds to meet it, on dishonour of the cheque the policy would again cease to be in force, even in the absence of the stipulation in this policy, which provides for such a contingency; it would be at most but a conditional payment, and the agreement to hold such a cheque till a future day, would at most be regarded as a conditional payment for that extended period. It is unnecessary to discuss what might have been the position of the company had the assured died within that period, where the agent had by the withholding the receipt negatived any intention to accept it, even as a conditional payment, it strikes me as amounting to nothing more than this, "notwithstanding the forfeiture of your policy, I consent to revive it if you make the payment on or before the time named, and you still continue in good health; but until such payment, the policy is not revived."

The effect might be different if the company's receipt had been given up; but even under those circumstances I apprehend that the *prima facie* presumption of payment afforded by the receipt, could be rebutted by shewing the dishonor of the cheque.

I think it sufficient for the disposal of this case, to say that whatever might have been the effect of taking and holding this cheque had the assured died before the 1st of October, that nothing subsequently occurred to revive the policy. There was no obligation on the part of the agent to receive the payment after that time, and the dishonored cheque lying in the agent's hands was not, and was not regarded by any one as payment.

I think it immaterial whether there were or were not funds in the bank applicable to this cheque on the 21st October. Nothing but payment could then revive the policy ; and I think there was no evidence for the jury of such payment, or of the facts alleged in the pleadings to dispense with it.

No one supposed that on the 20th October the policy was in force. How can the circumstance that there were funds lodged in the bank on the 21st, which might by possibility reach the hands of the company if they presented the check sufficiently early on the following day, alter the position of the parties ? The policy could only then be reinstated on payment, coupled with a certificate of good health.

I come to the conclusion that the policy was not in force at the time of the death of the assured, even if the agent could be considered as a general agent of the company without any limitation of his powers, but the agent here had no power to make a new contract binding the company and extending the time of payment. He had, it is true, as I read the contract, power, under certain circumstances, to receive payment after the day, and thereby to revive the contract: this was his only power, and this was made known to the assured by the contract itself. This payment was not made, and the contract having ceased to be in force on the 11th August, the Court below were, in my judgment, correct in holding that there was no case for the jury.

The appeal should, in my opinion, be dismissed, with costs.

SPRAGGE, C. J.—I have had the advantage of seeing the judgment which my brother Burton has prepared, and agree in what he has said.

A great deal may be conceded to the plaintiff and still fall short of shewing her entitled to a verdict against the defendants. She can have no possible title unless under the cheque of the 24th September, and what took place in regard to it on the 21st October, upon which Mr. Justice

Cameron rests his judgment. It may be conceded that at some time on that day there were funds at the Imperial Bank, and that the cheque would have been honored if presented shortly before 3 o'clock, on the afternoon of that day, or presented on the morning of the following day.

It was the fault of the unfortunate assured, not at all the fault of the defendants or their agent that it was not presented on the 21st. On the evening of that day the assured was killed. Let it be conceded that that passed between Mr. Wm. Smith and Mr. John Neill, Jun., that the latter says did pass, the plaintiff has still two difficulties to overcome: one, was further time given as put by Mr. Justice Cameron, and that by a person who had authority to give further time; and assuming that difficulty to be got over, how did things stand on the following day. The money was then receivable only upon the express condition that the assured was in good health, &c.; and there was the provision on the back of receipts given, that "if the fact is otherwise the policy shall not be put in force by such receipt." The premium being over due it was necessary that the policy holder should sign the "health certificate," and Mr. Smith says, "I always took that and the receipt with me. * * I would have given it (the receipt) to him if he had paid me the money, and I had got the health certificate." This would no doubt have been done on the morning of the 22nd, but the assured was then dead, and the carrying out what was intended, was simply impossible.

GALT, J.—The facts of this case are so fully stated in the judgment of the Court below, it is unnecessary to do more than refer to the report. It appears the premiums were payable quarterly, one of which payments fell due on the 10th August, 1879. The deceased transmitted a cheque to defendants' agent on the 24th September, for the amount, at the same time requesting the agent to retain it for a few days, as there were no funds then in the bank to meet it. This cheque was presented from time to time and payment refused. On the 21st October towards three o'clock in the

afternoon, the clerk of the defendants' agent called at the office of the deceased to request payment, and saw his son, who then informed him there were funds in the bank, and the cheque would be paid on presentation; as it was then within a few minutes of three o'clock, the clerk said he would present it in the morning. On the same evening the deceased died; the cheque being still unpaid. By the express terms of the policy "all premiums are due at the office of the company in the city of Augusta, at the date named in the policy, but at the pleasure of the company suitable persons may be authorized to receive such payments at other places, but only on the production of the company's receipt therefor, signed by the president or secretary. No payment made to any person, except in exchange for such receipt, will be recognized by the company, or be deemed by either party as valid payment." These conditions are not only set forth in the policy, but are indorsed on the back of each receipt. The policy had been granted in 1877, and no less than eight quarterly payments had been made and receipts given, so that the assured must have been fully advised of this condition. According to the evidence of John Neill, "the receipts were sent in advance of the cheque being received; I will not say always, but generally they were; we received the receipt without cheque or any thing at all; it was sent without asking." This is positively denied by the agent who acted for the defendants at the time when the previous cheque and receipt were given, and is so extremely improbable that if the case turned on that I should wish this special question to be again submitted to a jury; but admitting such to have been previously done, it was not so as regards the payment of premium due on 10th August, the one now in question. The receipt for that payment was never given up, and unless we are prepared to treat the condition contained in the policy as null and void, the plaintiff cannot recover. Suppose in place of this cheque of the 24th September being still held by the agent, he had called on the assured on 21st October and had then

received a cheque for the premium due on 10th August, but had retained the receipt until such cheque was paid, and that before such payment was made the life had terminated, and that on the following morning the agent, without being aware of the death of the assured had drawn the money from the bank, it appears to me the policy would have been void for the reason given by Williams, J., in *Pritchard v. Life Assurance Society*, 3 C. B. N. S. 639 : "Looking at the facts as they appear upon the pleadings, it is clear to my mind that the payment of the renewal premium was made by the plaintiff, and accepted by the defendants, not on any new contract but by way of indulgence under the contract contained in the original policy. Looking at the policy and the conditions annexed to it, I cannot entertain a doubt that the premium was paid and accepted upon an implied understanding on both sides that the party assured was then alive." The present case is very much stronger against the plaintiff. It had been expressly stipulated by the policy that the receipt of the defendants should be the only evidence of payment, and considering the manner in which the deceased had acted as respects this cheque, it would be vain to contend that the defendants' agent considered it as payment. He held it simply at the request of the assured for the purpose of presentation the following morning and conditional on that payment to leave him the company's receipt by which alone they were to be bound. For these reasons, and those set forth in the judgment of the learned Chief Justice of the Queen's Bench Division, I think, this appeal should be dismissed, with costs.

WILSON V. BROWN & WELLS.

County Court appeal—Remission to Court below for amendment—Discretion of Court below as to amending.

This case had been remitted to the Court below, this Court being of opinion that the record should be there amended and a verdict entered for the plaintiff against the defendant B. alone (6 App. R. 411). The learned Judge of the County Court, instead of entering such a verdict, directed a new trial, the parties to apply to amend their pleadings as they might be advised, so that B. might raise any defence which he was not obliged to raise in the action on the joint liability.

Held, that the direction of the learned Judge of the County Court as to the way in which he thought it most just to the defendant B. that the application to amend should be made, was an exercise of his discretion with which this Court would not interfere

After the allowance of the former appeal to the extent shewn ante vol. vi. p. 411, a rule *nisi* was obtained from the County Court to set aside the verdict entered for the defendants, and to enter a verdict for the plaintiff, or for a new trial between the parties, on the grounds:

“1st. That there was evidence that authority was given by the defendants to the defendant Brown to sign the partnership name to the note sued on in this cause; that such note was signed in pursuance of an agreement entered into between C. P. Hall, the other joint maker of the said note, and the said Brown & Wells; 2nd. That even if no express authority was given by the defendant Wells to the defendant Brown to sign the name of the said Wells, or the name of the said firm of Brown & Wells, yet the defendant Brown had such authority in pursuance of a mortgage made by said C. P. Hall to the defendants Brown & Wells, and that the said defendants so represented to the public and to the plaintiff that the said Brown had authority to sign the name of the said firm to the said note in this cause sued on that they are now estopped from denying that the said Brown had such authority; 3rd. That there was no evidence that the plaintiff so agreed to give time to the said C. P. Hall, one of the makers of the said note, as to discharge the defendants, and that the omission by the plaintiff to sue the said Hall was without consideration, whereby there was no binding agreement for good consideration by the plaintiff to give time to the said Hall, whereby the defendants were discharged; 4th. That at all events, and under any circumstances, the plaintiff is entitled to have the said verdict set aside, and to have a verdict entered against the defendant Brown.”

The rule came on to be argued before His Honor Judge Macqueen, who, after taking time to consider the case,

made the rule absolute to set aside the verdict and grant a new trial on payment of costs; his Honor remarking:

"In this case I think the plaintiff entitled to a rule absolute for a new trial, but only on that part of the fourth ground set forth in the rule *nisi*, which asks that the verdict rendered be set aside. I cannot, in disposing of the application before me, see my way clear to the ordering all that is asked for in the last ground of the rule, that is to order a verdict to be entered against the defendant Brown. 1st. Because there is no cause of action set forth on the record as against the defendant Brown other than as upon a joint contract against both defendants; 2nd. Because no amendment of the pleadings has been asked by the rule *nisi* to exclude the name of Wells and make Brown appear as the sole defendant. If the rule were to be made absolute in the terms of the fourth ground, there would appear on the face of the pleadings a verdict entered against the defendant Brown on a joint contract alleged against Brown & Wells, with no finding or verdict as to Wells, or as to Wells and Brown in their character of joint defendants, which would be incongruous and in fact a discontinuance.

The action was tried before the Ontario Judicature Act of 1881 came into force, so that the old rule that persons severally liable must have been sued in different actions, and persons jointly liable must in general have been sued in one action, was still in force. The new practice under rule 94 is, that in any action two or more defendants may be joined, and the question as to which (if any) of the defendants is liable, and to what extent, may be determined between all the parties; and this rule is, it appears to me, as applicable to actions already commenced as to actions in which the plaintiff is in doubt at the commencement of the action: See *McLennan*, p. 145, sec 94; and any application to strike out a defendant may be made to the Court or a Judge at any time before trial by motion, or at the trial in a summary manner. See Rule 104. I think that the necessities and justice of this case will be fully met by my setting aside the verdict and granting a new trial, and as I have not been asked by the rule *nisi* to make such amendment as was suggested by the decision of the Court of Appeal in this suit, I think it better to leave the case precisely as it stood before there was any verdict rendered. Then if the plaintiff thinks it necessary or proper to apply for an amendment, his case will stand as it did before verdict, and there will be full liberty to the defendants or either of them to make such defence to the amended state of the plaintiff's declaration as may be advisable, and my ordering a rule to go in this form will not prejudice either party in making or opposing any application that may be thought necessary.

"Had the plaintiff taken out his rule in the way suggested by the judgment of the Court of Appeal, such future application as to the pleadings might have been obviated, but I do not see at present that I could well make any other disposition of this rule under the application made to this Court.

"The rule will therefore be made absolute to set aside the verdict, and grant a new trial upon payment of costs."

From this judgment the plaintiff appealed, and the cause came for argument before this Court, January, 11, 1882.*

McCarthy, Q. C., for the appeal, contended that the amendment was directed to be made, and the verdict entered for the plaintiff against the defendant Brown, by the former judgment of this Court: that the application of the plaintiff for such amendment having been made after the coming into force of the Judicature Act of Ontario, the plaintiff was entitled thereto, and to have the defendant Wells struck out as a party defendant, and to have a verdict entered for the plaintiff against the defendant Brown, under and pursuant to the provisions of that Act; and that upon the evidence of the defendant Brown, and upon the facts as contended for by him, he, as the maker of the promissory note sued upon, was liable to the plaintiff thereon, and there was and is no matter to be tried, and on the admission in his own evidence there was no object in sending the case down for another trial.

Falconbridge, contra, submitted that this Court had not any intention in granting the order which had been made on the previous appeal, of fettering in any manner the discretion of the learned Judge in the Court below, and under the circumstances this Court would not interfere with the direction he had now given. For aught that now appears, Brown may have a perfectly good defence to this action, which he may choose to avail himself of when the record is properly framed, and which it would be unjust now to deprive him of.

March 24, 1882. The judgment of the Court was delivered by PATTERSON, J. A.—This case is before us for the third time. The second appeal was from the refusal of the Judge of the County Court of a rule *nisi* to set aside the verdict for the defendants, and to enter a

* *Present*.—SPRAGGE, C. J., BURTON, PATTERSON, AND MORRISON, JJ. A.

verdict for the plaintiff against both defendants, or against defendant Brown alone, or for a new trial on the law and evidence. We were of opinion that upon the evidence reported to us the defendant Brown would have been properly held liable, although there could not be a verdict against both defendants. The declaration, however, being upon a joint contract, a verdict for one defendant and against the other could not have been regularly entered upon the record as it stood. An amendment was required to make the action one against Brown as upon his several promise. No amendment had been asked for in the Court below, and we did not consider that we had jurisdiction to make the amendment upon an application made for the first time to this Court. We therefore remitted the case to the Court below, in order that the rule *nisi* should be granted, expressing our opinion that upon the return of that rule it would be proper for the Court below to make the amendment. The rule *nisi* was accordingly granted. It did not ask for an amendment, having been drawn up upon the original motion paper, but upon the argument of the rule the plaintiff's counsel applied to have the amendment made.

The learned Judge declined to make the amendment at that time. He gave reasons in the judgment, which he has reported to us, which are certainly open to the observation made by Mr. McCarthy, that they are technical in their character, and which do not appear to us to have so much force as the learned Judge seems to have attached to them. He may, however, have been influenced also by a suggestion that an amendment made for the purpose of warranting the entry of a verdict at that stage of the case against Brown alone would be unfair to Brown, who might have some defence against an action against him solely, which he might not have considered it necessary to plead to the joint action, which he relied upon defeating on the ground of the misjoinder of the co-defendant. This suggestion was supported by an affidavit from Brown's solicitor, who had also been his counsel at the trial. We have read

this affidavit and are not struck with the defence suggested, as being formidable in its character, to say nothing of its being only on the information of the attorney, without any confirmation by the oath of the defendants, or either of them, or of any one else who has knowledge of the facts.

Upon the whole we do not see why the amendment asked for should not have been made, or that injustice would have been done by making it.

What the learned Judge did was to make the rule absolute for a new trial on payment of costs, restoring the *status quo* before the trial, and leaving the parties at liberty to apply to amend their pleadings as they might be advised.

The plaintiff appeals upon the ground that the amendment ought to have been made and the verdict entered for him against Brown.

But while it may be our opinion that what the plaintiff asked might properly have been done, and even that it would have been more just so to dispose of the matter, we have to consider on what principle we ought to interfere.

Our expression of opinion, when we remitted the case to the Court below, was not intended to be, and could not be treated as an "order or direction to the Court below, touching the judgment to be given in the matter as the law requires," under the 41st section of the Act respecting County Courts: R. S. O. ch. 43.

We do not for a moment entertain the idea that the mode in which the learned Judge disposed of the rule implies any disregard of the opinion we expressed, or any opinion adverse to the propriety of making the amendment. He has merely exercised his own judgment as to the way in which it will be most just to the defendant that the application to amend shall be made.

We must look at the case just as we should have done if the rule had been granted when first moved for, and as if what has now been done had been done then.

We should then have the case of a rule *nisi* granted, asking to have a verdict which had been rendered for two defendants in a joint action against them set aside, and

a verdict entered for both or one of them, or for a new trial; and the Court upon the return of that rule being of opinion that the plaintiff failed to sustain his right to a verdict on the record as it stood, but that he might, if a proper amendment were made in the form of his action, succeed against one of them, and for the purpose of enabling the plaintiff to apply to make the amendment, which the Judge thought could not be made at once without unfairness to one party, making the rule absolute to set aside the verdict, and for a new trial.

This seems to be a matter so entirely of discretion, that it would be an unusual exercise of our appellate jurisdiction to interfere with what has been done, merely because we may entertain the opinion that we should have ourselves relieved the parties from the trouble and expense of a new trial.

It is unfortunate that the plaintiff did not accept the decision without adding to the already heavy expense of the suit the costs of this appeal.

We do not, however, see our way to avoid dismissing the appeal, and there does not appear to be any sound reason why we should not follow our general practice, and dismiss it with costs.

PIERCE V. CANAVAN ET AL.

Mortgage—Equity of redemption—Indemnity.

R. owned lots D and E, and mortgaged them. The mortgagee (J.) assigned the security and afterwards bought up the equity of redemption. P., the plaintiff, subsequently purchased lot D, for which he paid the full value and obtained a conveyance containing statutory covenants for title and possession. J. subsequently sold lot E to a *bonâ fide* purchaser, who conveyed to the appellant ;

Held, affirming the judgment of the Court below (28 Gr. 356), that P. was entitled to be indemnified out of lot E to the full extent of the value thereof against the amount due on the mortgage.

THIS was an appeal by the defendant Canavan, from a decree pronounced by Blake, V. C., as reported 28 Gr. 356, in so far as the same related to or had the effect of casting upon lot E, on Courtwright street, in the town of Victoria, the whole burden of the mortgage in question in the cause, and of exonerating therefrom lot D, in the proceedings mentioned.

The bill, which was by R. Vaughan Pierce against John Canavan, (the appellant) and Harry E. Caston, set forth in effect (1), that on the 9th day of April, 1873, one William J. Beales, who was the owner of parts of lots No. 7 in the first and second concessions of the township of Bertie, in the county of Welland, being lots lettered D and E on Courtwright street in the town of Victoria, mortgaged the same to one Stephen M. Jarvis, to secure \$500 and interest : (2) that on the 17th of November, 1873, Jarvis assigned the said mortgage with others to the Metropolitan Permanent Building Society ; (3) that on the 22nd of December, 1873, Beales assigned and granted the said two lots D and E to Jarvis ; (4) that on the 26th of January, 1874, Jarvis conveyed to one Sylvester Pratt the east thirty-eight feet of lot lettered D, and on the 24th of May, 1875, Pratt conveyed the said last-mentioned land to the plaintiff ; and on the 29th of May, 1875, Jarvis conveyed to the plaintiff the balance or west half of the said lot lettered D ; (5) that all the conveyances in the last preceding paragraph mentioned, were made in pursuance of the

Act respecting Short Forms of Conveyances, and by them Jarvis duly covenanted that there were no incumbrances on the said lands, and that the plaintiff should have quiet possession thereof free from all incumbrances; (6) that subsequently to the said conveyances to the plaintiff Jarvis sold and conveyed lot lettered E to the defendant Caston, subject to the said mortgage in the first paragraph mentioned, and the said defendant Caston undertook to pay off and satisfy the amount due on the said mortgage; (7) that in or about the month of March, 1878, one Robert G. Barrett, who claimed to be the assignee of the said mortgage, gave notice to the plaintiff that unless the sum of \$500 and interest from the 9th day of April, 1873, which he claimed to be due on such mortgage, was paid, he would proceed to a sale of said lands in pursuance of the power of sale contained in the mortgage; (8) that thereupon the plaintiff at once took steps to ascertain if the amount so claimed was really due and owing, and was informed by Caston and Jarvis that they contended that the sum so claimed by the said Robert G. Barrett was not due and payable under the said mortgage; (9) that on the 27th of April, 1878, it was agreed between the plaintiff and Caston as follows:

“In consideration of the plaintiff making a tender to the said Robert G. Barrett of the sum of five hundred and forty-three dollars as the amount due on said mortgage, the said defendant Caston undertook and agreed to pay off and satisfy the said mortgage and pay the sum tendered, in case the said Robert G. Barrett should accept the same in payment of the said mortgage, and in case the said Robert G. Barrett did not accept the said sum, the defendant Harry E. Caston undertook to pay such amount as might be found to be due on the said mortgage, together with any costs that may be awarded to the said Robert G. Barrett, in any proceeding that the plaintiff might take for redemption of the same.”

The intention of such agreement being that Caston should pay off such mortgage in order that the property owned by the plaintiff and covered thereby might be released from the same, Caston having agreed that the mortgage should be charged only upon the land held by him; (9) that in pursuance of such agreement, the plain-

tiff on the 7th of May, 1878, made a tender of the said sum of \$543 to Barrett, which tender was refused by him. Thereupon the plaintiff filed his bill against Barrett, seeking for the redemption of the said lands from the said mortgage; and such proceedings were had and taken in that suit that a decree was made referring it to the Master to ascertain the amount due upon the said mortgage, who made his report, finding that the sum of \$853.93 was due under the said mortgage and for costs of suit; (11) that on the 22nd of March, 1880, the plaintiff paid the sum of \$897.32, the amount due on the said mortgage, with subsequent interest and costs; and plaintiff claims (that he was entitled to be repaid the amount so paid, and the costs and expenses so incurred by him in bringing said suit; (12) that during the pendency of the said suit, Caston conveyed to Canavan the lot lettered E, subject to the payment of the sum due on the mortgage, and Canavan took the said lot, well knowing that the same was subject to the payment of the amount to be paid to satisfy such mortgage.

The bill further alleged that plaintiff having taken the proceedings and incurred the costs and expenses and paid money in pursuance of such agreement, he was entitled to be paid the same by Caston, and claimed the benefit of the said mortgage against the said lot lettered E.

The prayer of the bill was, that Caston might be ordered to pay to the plaintiff the said sum of \$897.32 with interest, together with the costs and expenses incurred in said suit, and that the same should be declared a lien solely upon the said lot lettered E; that in default of payment lot lettered E might be sold and the proceeds applied in or towards the payment of the said sum and interest, and that in case of any deficiency Caston might be ordered to pay the amount thereof to the plaintiff; and for further and other relief.

Canavan, by his answer, admitted having purchased the lot lettered E from Caston, and alleged that at the time of such purchase Caston informed him of the exis-

tence of the mortgage, which he said covered other land owned by the plaintiff, and that Caston also informed him that he had agreed with the plaintiff, through his solicitor that the said lot E should only be liable for one half of the mortgage money, and one half of certain costs incurred in respect thereof, which Caston then said would together amount to about \$450, and that this sum he agreed to assume and pay; and submitted that under the agreement between the plaintiff and Caston he should not be called upon to pay more

By his answer he also alleged that since the commencement of this suit, and on the 22nd of September, 1880, he had caused to be tendered to the solicitors for the plaintiff the sum of five hundred dollars, in full of the plaintiff's claim under the said mortgage and agreement with Caston, and costs of this suit up to the date of such tender, but which the plaintiff refused to accept, and submitted that the plaintiff should be ordered to discharge the said mortgage as against the said lot E upon the receipt of the one half of the said mortgage debt and costs as aforesaid.

Caston, by his answer, also alleged that—

“My said co-defendant Canavan, upon the purchase of the said lot E, undertook and agreed with me to assume and pay the incumbrance against said lot E in respect to said mortgage, supposed to be one half of said mortgage and costs, and I believe the said Canavan has tendered to the plaintiff a sum sufficient to cover the same, which the plaintiff has refused and still refuses to accept. I say that no agreement signed by me that the plaintiff's said mortgage should be a charge only upon the said lot E, as stated in the 9th paragraph of the said bill, has been made, entered into or signed by me, or by any agent on my behalf thereunto lawfully authorized, and I claim the benefit of the Act passed in the 29th year of the reign of His Majesty King Charles the Second, entitled “An Act for the prevention of frauds and perjuries,” in the same manner as if I had demurred to the plaintiff's bill, and I pray to be hence dismissed with my reasonable costs of suit.”

The decree pronounced by the Vice-Chancellor declared

“That as between the plaintiff and the defendants that portion of the land embraced in the mortgage from W. J. Beales to S. M. Jarvis in the pleadings mentioned, which has been conveyed to the defendant John Canavan, in the pleadings also mentioned, is primarily liable for the satis-

faction of the mortgage debt, and doth order and decree the same accordingly. And it appearing that the plaintiff hath paid off and discharged the said mortgage, and the defendants by their counsel alleging that the amount paid by him in the discharge of the said mortgage is in excess of the sum actually due thereon, and desiring that the account hereinafter mentioned should be taken : This Court doth thereupon order and decree that it be referred to the Master of this Court to inquire and state what, if anything, is due and owing to the plaintiff for and in respect of moneys properly paid by him in discharge of the said mortgage, and also what amount, if anything, is due to the plaintiff for and in respect of the costs incurred by him in the suit brought to redeem the said mortgage."

Reserving further directions and costs.

The plaintiff claimed, by way of cross appeal, that, in the event of Canavan being relieved from payment, an order might be made that Caston should pay the plaintiff the amount claimed in terms of the agreement alleged to have been entered into between them, as set forth in the bill.

The appeal came on for hearing on the 21st of November, 1881.*

Osler, Q. C., and F. Hodgins, for the appellant. It does not appear that the mortgage created by Beales was an incumbrance personally binding upon Jarvis at the time of the conveyance of lot D to the respondent, or to those through whom the respondent claims, nor does it appear that such conveyance contains any warranty as against incumbrances. The right claimed by the respondent to cast the whole burden of the incumbrance upon lot E, in exoneration of lot D, was even as against Jarvis a mere latent equity arising out of the contract with Jarvis, and only binding as between the parties to that contract, and perhaps upon purchasers with notice, and it is not shewn that Caston took with notice of the existence of any such equity, but on the contrary it appears that he took without notice, and he acquired a title to lot E, freed from any such equity, and conveyed the same so freed to the appellant, who is therefore entitled so to hold it. It is not shewn that the respondent is the assignee of the mortgage, and he cannot

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be subrogated to the rights of the mortgagee, nor can the equity claimed by him be enforced against lot E, unless it appears that he is in a position to assign the mortgage and all benefit to be derived therefrom to the owner of lot E: *Brown v. O'Dwyer*, 35 U. C. R. at 365; *Re Buck, Peck v. Buck*, 6 P. R. 98; *Ker v. Ker*, Ir. L. R. 4 Eq. 15; Sir *William Harbert's Case*, 3 Coke 11 (b); Notes to *Aldrich v. Cooper* in *White and Tudor's* L. C. in Eq., 3rd Am. ed., from 2nd Eng. ed., vol. 2, p. 239; *Stronge v. Hawkes*, 4 DeG. & J. 651-2; *Story's Eq. Jur.*, s. 1233; *Thompson v. Wilkes*, 5 Gr. 594; *Henderson v. Brown*, per Strong, V. C., 18 Gr. p. 89; *Cator v. Lord Pembroke*, 1 Br. C. C. 301, S. C. 2 Br. C. C. 282; *Egleson v. Howe*, 3 Ap. R. 566; *Pardee v. VanAnken*, 3 Barb. at 541; *The Conn. M. Ins. Co. v. N. Y. R. Co.*, 25 Conn. 265; R. S. O. ch. 111, sec. 81.

Ewart and W. Roaf, for the respondent. The conveyances here disclose the agreement. By them the grantor conveys the land—not any particular estate or interest therein—subject only “to the reservations, limitations, provisoes, and conditions expressed in the original grant thereof from the crown.” The grant therefore was clearly not “subject” to the mortgage, and if not subject, must have been free from it. A grant of land, without more, was formerly construed not merely as a conveyance of an estate in fee simple, but as a warranty that the grantor had in him such an estate; and although now the word “grant” no longer implies a warranty of title (R. S. O. ch. 98, ch. 6.) yet the remaining implication of the word remains. In *Thompson v. Wilkes*, 5 Gr. 594, the purchase was of property “subject to the mortgage;” the sale was on the face of it a sale of an equity of redemption, whereas, in the present case the sale and conveyance were of the land. However, if the deed is to be taken as affording no information of the existence of the admitted agreement, still the appellant had notice of it, for the presumption in such cases is, that the sale was free from incumbrances. See *Dart on Vendors and Purchasers*, 3rd ed., 914. Apart altogether from the form of the deed and the legal presump-

tion, the mere fact of the existence of the deed is notice of the existence of some agreement, and that agreement must have been either (1), that the grantor should pay off the mortgage; (2), that the grantee should pay it; or, (3), that the burden should in some proportions be divided. It cannot be said that the respondent was bound to assume that the third alternative was the one the parties had adopted? Indeed, it may be asked, why should he have made any assumption other than the one which Mr. Dart, at the page referred to, says would be made under similar circumstances? It was not necessary that the respondent should have procured an assignment of the mortgage which he paid off prior to filing this bill. It was the duty of the appellant and his co-defendant to pay off the mortgage and procure it to be discharged. They failed in their duty, and the respondent has been compelled to perform a part of it; that affords no reason, however, for compelling him to perform the remainder. If the law were otherwise it would be impossible, in case the mortgage were made payable by instalments, to file such a bill as the present until after payment of the last instalment, which might be years after payment of the first.

They also contended that the defendant Caston should have been ordered to pay the respondent the sum of \$897.32, together with interest thereon from the 22nd day of March, 1880, and the costs of the suit.

March 24, 1892. BURTON, J. A.—This is an appeal by John Canavan, one of the defendants, from a decree made by the late V. C. Blake, in so far as that decree has the effect of casting upon Lot E. on Courtwright street, in the town of Victoria, the whole burden of a mortgage existing upon the property, and of exonerating Lot D. which was also included in the mortgage.

Both the plaintiff and the defendant claim under the same grantor, Mr. S. M. Jarvis; and the mortgage in question was not given by him, but by one Beales, through whom he claimed.

The conveyance from Beales to Jarvis makes no allusion to the mortgage.

The main contention of the appellant is, that as the mortgage was not personally binding on the plaintiff's vendor at the time of the conveyance to the plaintiff, and that conveyance contained no general covenant against incumbrances, the paramount burden should be borne by the purchasers ratably in proportion to the value of their respective lots.

The plaintiff's bill is framed upon the assumption that his vendor's deed contained full covenants for title, and covenants that there were no incumbrances upon the land. Had this been so, the case would, I think, have been free from difficulty; but this is not only not the case, but the vendor has given and the plaintiff accepted covenants which are expressly limited and restricted to his own acts.

There is no pretence of concealment or fraud. Mr. Jarvis being under the impression apparently that this particular lot sold to the plaintiff had been released from the mortgage. Had the plaintiff therefore been evicted by the holder of the mortgage he would clearly have been without remedy at law, and I apprehend equally so in equity.

Lord St. Leonards lays down the rule shortly in this way: "If the conveyance has been actually executed by all necessary parties, and the purchaser is evicted by a title to which the covenants do not extend, he cannot recover the purchase money either at law or in equity;" and again, "If the purchaser neglect to look into the title, it will be considered as his own folly, and he can have no relief."

The cases were fully considered and reviewed by the late Sir John Robinson many years ago, in the case of *Thomas v. Crooks*, reported in 11 U. C. R. 579.

But on a bill for foreclosure or sale by the mortgagee, the equity of the plaintiff would have been that his lot should not be resorted to unless the other portion remaining in the hands of his vendor was not sufficient for the satisfaction of the mortgage money. It is the duty of

the vendor who has been paid in full to discharge any incumbrances on the land, and it is immaterial as regards the application of the principle whether the paramount incumbrance was created by the vendor or resulted from the act of a prior owner. The vendor is charged, not because the lien is for his debt, but because he has contracted expressly or impliedly for a clear title; if therefore the incumbrance extends to the other lands, those and not the land conveyed are the primary fund for its payment. See remarks of Lord Chancellor Hart and Lord Plunkett in *Hartly v. O'Flaherty*, Beatty 79, referred to in the judgment of V. C. Blake; see also *Beevor v. Luck*, L. R. 4 Eq. 537.

The whole difficulty has been caused by the loose mode of conveyancing which has been adopted; all the covenants both for title and for freedom from incumbrances being restricted to the acts or incumbrances of the grantor. If there had been an express declaration that the land was sold free from all incumbrances, the question would have been free from doubt.

Of course when the first conveyance is voluntary, a covenant against incumbrances is all important, as without such a covenant it would be assumed that nothing vested in the grantee save the estate that the grantor had, with all its incidents; but in the case of a conveyance for value, the inference would be rather that the land agreed to be sold was free from any incumbrance, and that it should therefore appear upon the face of the conveyance that it was sold subject to the incumbrance if such was the intention; but the evidence shews that the full price asked was paid for the land, and that it was the lot itself, not the equitable interest of the vendor, that was bargained for and sold, and the deed professes to convey the fee simple of the land. It is clear that Jarvis, if compelled to pay the mortgage, could have had no claim for contribution against the plaintiff; neither can the purchaser from him, who took with notice of the mortgage, and had notice by registration that a portion of the mortgaged premises had

been sold for value previously to his own purchase, make such a claim. I think, therefore, that the defendant's claim to have a portion of the incumbrance cast upon Lot D, fails. The cases are all collected and reviewed in a learned note by the editor of *Bythewood & Jarman*, vol. ix., p. 127, and one of the conclusions drawn by Mr. Dart is, that in such a case as the present the plaintiff would have a *prima facie* equity, in the absence of express agreement, to throw the burden on Lot E; the purchaser therefore of that lot, having notice of the plaintiff's purchase, was bound to inquire.

As to the cross appeal, there can be no pretence for making a personal order against the defendant Caston in the absence of a special agreement, which the learned Vice-Chancellor has found to be not established.

I think the judgment of the Court below should be affirmed, and the appeal dismissed, with costs.

SPRAGGE, C. J., PATTERSON and MORRISON, JJ.A., concurred.

LAVIN V. LAVIN.

Voluntary conveyance—Independent advice.

A conveyance of land from a man ninety years old to his son was prepared on the instructions of the latter, and recited that the son had agreed to pay his father \$10 a month for his life, but no such agreement had in fact been made, and there was no other consideration. The deed was not explained to the father, and the solicitor's clerk, who witnessed it, could not say that he had even read it over to him. There was no direct fraud, but the father who had become childish was under the influence of his son and had acted without advice.

Held, affirming the decision of the Court below, (27 Gr. 567) that the deed, having been executed without proper advice, should be set aside.

THIS was an appeal by the defendant Thomas Lavin from the decree in the Court below, reported 27 Gr. 567, setting aside a deed executed by the testator John Lavin, to the said Thomas Lavin, which came on to be argued before this Court on the 17th of May, 1881.*

The facts appear in the report of the case in the Court below and in the judgment.

O'Donohoe and Haverson, for the appellant.

J. H. McDonald, for the respondents.

On behalf of the appellant, it was contended that the evidence at the hearing was insufficient to warrant the pronouncing of a decree setting aside the conveyance from his father to the appellant. That the testator knew perfectly well what he was doing when the deed was produced to him for execution; and the instrument itself was sufficiently explained to the grantor. The transaction itself having been fair and honest, and no fraud whatever having been imputed to the defendant, he was entitled to retain the benefit of the conveyance, it not being anywhere alleged or shewn that the deceased was to any extent incapable of legally executing the document.

For the respondent it was insisted that the position of the parties and the nature of the deed, was such as to

**Present*.—BURTON, PATTERSON, MORRISON, J. J. A., and CAMERON, J., Q. B. Div.

throw upon the appellant the *onus* of shewing by clear and irrefragable evidence, that the grantor clearly apprehended what he was doing, and fully understood the effect of the deed he was executing; and that he had had independent advice as to the advisability of his signing it; that the evidence adduced for this purpose wholly failed, and the evidence of the appellant himself was wholly insufficient in these respects. *Mason v. Seney*, 11 Gr. 447; *Bee-man v. Knapp*, 13 Gr. 398; *Walker v. Smith*, 29 Beav. 396; *Hugnenin v. Baseley*, Wh. & T. L. C., 5th ed., p. 584, and cases there cited, were referred to.

March 24, 1882. BURTON, J. A.—The appellant alleges two grounds in his reasons of appeal for reversing the decision of the Court below.

1st. That there was no evidence to shew the existence of a partnership between the defendant and his sister, Margaret O'Neill, deceased, and that the decree therefore should be reversed, so far as the Parliament street property is concerned; and secondly, that there was not sufficient evidence on which to set aside the deed.

With reference to the first objection, it is sufficient to say that the learned Chancellor abstained from any expression of opinion in reference to the existence or non-existence of the alleged partnership, not deeming it relevant to the question of the validity of the conveyance; and as that question may possibly involve further litigation, I shall follow his example and refrain from the expression of any opinion upon the question.

The only question, therefore, on which we are called upon to adjudicate is as to the sufficiency of the evidence by which the deed to the defendant was sought to be impeached.

It may be conceded that it is not the province of a Court of Equity to assist a person, or any one claiming through him, to rescind a voluntary conveyance, where it is free from any imputation of surprise or undue influence, but is spontaneously executed by the grantor with his eyes open. Is this a case of that nature?

The donee in the present case was one of the children of the grantor, who was over ninety years of age; and the learned Judge has pointed out that this comes within a class of cases where it has been held that the donor having arrived at an age when he had come under the sway of his children, and was liable to be influenced by them, any deed procured by one of them largely benefited was liable to be closely scrutinized, and cast upon the donee the onus of establishing that the person giving him that benefit did so voluntarily and deliberately, well knowing what he was doing. The finding of the learned Judge that that was the state of the old man's mind is abundantly confirmed by the statements of the defendant Thomas and his sister, who both avow that they went to bring him away from Bothwell, because they feared he would be influenced to make a will; Thomas saying: "I was suspicious that they would try to get my father to make a will." They both admit that the old man did not trouble himself about business affairs, as there were others, meaning themselves, to look after them; and the female defendant states that he would be governed by Thomas (the defendant), and always was.

I think it manifest from the accounts given by several of the witnesses of what occurred at Bothwell after the ineffectual separate efforts of Thomas to bring him down, followed by the successful effort of the combined forces, that the old man had become a mere child; and I am not surprised that the learned Judge was unable to bring himself to the conclusion that the deed complained of was a valid conveyance.

The defendants' account of the mode in which that deed was obtained, is quite sufficient, I think, to shew that it was the deed of the defendant Thomas, and not that of the father.

He says the old man told him after he came down to beware of William; although why that caution should *then* be necessary, is not very apparent, and acting upon that, "he went and got the deed done."

The deed was accordingly prepared upon the defendant's instructions; and on its being brought to the father for execution, he said: "Father, this is the lawyer come with the deed to be signed; and he took the chair, moved it over to the table toward the window, and took a pen and signed his name to it, and knew perfectly well what he was doing;" adding, in answer to a further question, "that it was not read over to him, and that all the lawyer's clerk said to him was, 'that it was a deed he wanted him to sign.'"

This seems to be confirmed by the evidence of the clerk who attested the signature, and who is unable to say whether he read over the deed, and says in express terms that he cannot say that he explained it.

Here then we have a deed containing a recital that the grantee had agreed to pay the grantor during his life \$10 per month, an agreement which had no existence in fact, and which had never been referred to between the parties, but which had been inserted at the instance of the grantee to remove all objections on the part of the grantor in case he required the deed to be read over before signing. I do not think such a transaction can be characterized in more fitting terms than those used by Bowie, C. J., in the extract which the learned Judge below has given from his judgment: "Whatever the one suggested the other executed. There was no consent of two minds, but a merger of one in the other. In such cases, it is not necessary to prove the actual exercise of over-weening influence, misrepresentation, importunity, or fraud, *aliunde* the act complained of."

I come to this conclusion, giving full effect to the evidence of Thomas Lavin and his sister, but some of their evidence is, to use a mild term, very disingenuous. I had a strong conviction on the argument that the production of the letter from Mr. McCraney would disprove the statement that the \$74 paid by Thomas Lavin was a payment to William on account of board, and its subsequent production has verified that impression, not a syllable being said

in it about maintenance, but requiring a full statement of his dealings with the estate of Margaret O'Neill; and yet the defendant Thomas Lavin in the eighth paragraph of his answer deliberately swore that the plaintiff demanded payment for the maintenance and support of his father, and he went to Bothwell and paid that sum for his support.

I think the judgment of the learned Chancellor was correct, and that this appeal should be dismissed, with costs.

PATTERSON and MORRISON, JJ.A., and CAMERON, J., concurred.

HODGINS V. THE ONTARIO LOAN AND DEBENTURE COMPANY.

Loan company—Public announcement of company's rule—Payment of mortgage pursuant to—Retrospective rule.

A circular was issued, with the knowledge of the directors of the defendants' Co., which, amongst other things, set out that "loans can be paid at any time and a discharge of the mortgage will be given, the rule of the society being, when this privilege is taken advantage of, to charge three months' additional interest at the same rate at which the loan was made." The plaintiff saw this circular exposed in the office of an appraiser of the company through whom the loan was effected, and was thereby induced to mortgage his land for twenty years, the loan to be repayable on the instalment plan.

Held, (affirming the decree of the Court below) that the plaintiff could insist on redeeming his mortgage according to the terms set forth in the circular, such right being sustainable either on the footing of the contract evidenced by the mortgage, the effect of which was to incorporate the rules of the society, while the evidence shewed that what was put forward in the circular as the rule of the society, was one of the rules referred to in the mortgage; or on the footing of a collateral and independent contract.

Held also, that, although the mortgage recited that the mortgagor was a member of the society, having subscribed for eighty-eight shares of the stock, which the society had agreed to pay him in advance on receiving that security therefor, &c., yet without express stipulation to that effect, the mortgagor could not be affected by rules made subsequently to the execution of the mortgage, even if he could under the system under which the operations of the society were carried on be considered a member when he had received the amount of his shares; but that at all events his liability could not be extended beyond the clear words of his contract, which did not point to any but the then existing rules.

THIS was a bill of redemption filed by George Hodgins against The Ontario Loan and Debenture Company, in order to compel the defendants to accept payment of the amount of principal and interest accrued due upon a mortgage executed by the plaintiff in favour of the defendants in the month of November, 1874. By a printed circular issued by the defendants, addressed to borrowers, it was stated: "Loans can be paid up at any time and a discharge of the mortgage will be given, the rule of the society being, when the privilege is taken advantage of, to charge three months' additional interest at the same rate at which the loan was made."

The sum borrowed by the plaintiff was \$4,400, and the same was to be paid in twenty annual instalments of \$489.28.

The defendants refused to accept the amount tendered in discharge of the mortgage, insisting that they had a right to retain their security for the full period of twenty years, notwithstanding the rule above set forth, which had been issued to the public generally; and by a circular, issued from the head office of the defendants in London, and proved as exhibit "N" in the cause, which was addressed to their several appraisers, those gentlemen were informed, amongst other things, that—

"Borrowers will obtain their money where it can be had at the cheapest rate and most expeditiously, and with the most favourable terms of repayment. This Society offers all these inducements. You will find on comparison that our rates are as low, and in other respects more favourable than any other Society; this will be found the case especially on comparing our rates with those Societies who agree to pay lawyers' charges. The comparison in these cases will show nearly $\frac{1}{2}$ per cent. per annum in favour of this Society. Borrowers can pay off their loans with us on the first day of any month by paying three months' additional interest at the same rate at which the loan was made. If security offered is sufficient, and title perfect, advances of money can always be obtained."

The cause came on before Spragge, C., at the sittings of the Court at London, in the Spring of 1881, who made a decree whereby it was declared:

"(1) That the plaintiff was entitled to redeem the mortgage in the pleadings mentioned on the first day of November last, being the date of the tender in the pleadings mentioned, upon payment of the sum of three thousand eight hundred and fifty-five dollars, being the sum tendered upon that day by the plaintiff to the defendants, and that the said tender ought to have been accepted by the defendants in full satisfaction of their said mortgage; and doth order and decree the same accordingly. (2) And this Court doth further order and decree that upon payment into this Court to the credit of this cause, within one month from the issuing of this decree, of the said sum of three thousand eight hundred and fifty-five dollars, with interest thereon at five per cent. per annum from the first day of November last, being the amount of interest admitted by the plaintiff to have been realized by him upon the amount so tendered, the defendants do execute a discharge to the plaintiff of the said mortgage, such discharge to be settled by the Master of this Court in case the parties differ about the same, and do deliver up on oath to the plaintiff all deeds and documents in their possession relating to the said mortgaged premises; and the money so paid in is to be applied as follows: First in payment of the plaintiff's costs of this suit, to be taxed by the said Master, and the balance is to be paid out to the defendants. (3) But in default of such

payment being so made as aforesaid by the plaintiff, this Court doth further order and decree that the defendants do pay to the plaintiff his costs of this suit, to be taxed as aforesaid, forthwith after taxation, and that the plaintiff do stand absolutely debarred and foreclosed," &c.

From this decree the defendants appealed, and the appeal came on to be argued before this Court on the 30th January, 1882.*

Bethune, Q. C., for the appellants.

Street for the respondent.

Mackenzie v. Coulson, L. R. 8 Eq. 375; *Fowler v. Fowler*, 4 DeG. & J. 250; *Young v. Austin*, L. R. 4 C. P. 553; *In re Norwich Building Society, Smith's Case*, L. R. 1 Ch. D. 481; *Erschine v. Adeane*, L. R. 8 Ch. 756; *Salaman v. Glover*, L. R. 20 Eq. 444; *Superior Society, &c. v. Lucas*, 44 U. C. R. 106; *Campbell v. Edwards*, 24 Gr. 152; R. S. O. ch. 164, sec. 50, were referred to.

The other facts of the case, and the points relied on by counsel, appear in the judgment.

March 24, 1882. BURTON, J. A.—The defendants are a Building Society, doing business in the city of London, and the plaintiff, who was a member and borrower from the Society, files his bill, seeking a declaration that he is entitled to pay off the loan upon the terms of the printed circular, and notice to borrowers mentioned in the bill.

The plaintiff had, previously to the filing of the bill, tendered to the defendants an amount sufficient to pay off the debt if held entitled to redeem in the terms of that circular.

There is no evidence that Porte, the appraiser or agent of the company through whom the loan was effected, had any authority to state any thing to borrowers other than what is contained in the printed instructions given to them. On the contrary, it is expressly sworn to by the manager that the appraiser had no such authority, and I must confess that the evidence given by Porte and the

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plaintiff, as we see it in the books, does not impress me favourably ; nevertheless, it is established to the satisfaction of the learned Judge who heard the case, and had the best means of judging of the truth of their testimony, that such a circular as is referred to in the bill, addressed to borrowers, was issued by the defendants, and was posted and exhibited in the office of Porte, and was called to the attention of the plaintiff. It is not therefore a question of the authority of the agent, but whether there was evidence that a notice intended for borrowers was brought to the notice of the plaintiff, and acted upon by him when negotiating for this loan. That notice contained certain tables which purported to shew the monthly or other periodical payments required to redeem an advance of \$1,000, in periods ranging from two to twenty years ; and also containing the following statements :

“ The system of repayment of loans set forth in the loan tables of the Society enables borrowers to pay off their mortgages by small periodical payments, payable in such sums and at such times as may suit their convenience. This system cannot be otherwise than safe and advantageous to all desirous of reducing their liabilities promptly.

“ The published loan tables of the Society are for the inspection of all, rendering borrowers free from the possibility of extortion, deception, or fraud, the loans being made at a fixed and uniform rate.

“ Loans can be paid up at any time, and a discharge of the mortgage will be given, the rule of the Society being, when this privilege is taken advantage of, to charge three months additional interest at the same rate at which the loan was made.”

It is stated by the manager in his evidence that there was no such rule or by-law of the Society then in existence, and that what it was intended to express was, that that was their usual custom or practice ; and that if the parties desired to avail themselves of the privilege, it was expected that it would be stated in the application and embodied in the mortgage. Nor do I think this explanation very satisfactory, for I find in some of the papers

produced at the Hearing, the matter is referred to in more emphatic terms than in the papers on which the plaintiff is alleged to have acted.

In one of these, a paragraph is prefaced with these words: "*The following is the rule of this Institution,*" previous to an announcement in the identical words used in the paper I have just referred to.

I think that it is only reasonable to construe the words in question as referring to a fixed rule or regulation of the Society in respect to loans, and not to a matter as to which the directors might exercise an arbitrary discretion.

But it is said that even assuming it to be satisfactorily established that the circular was shewn to the plaintiff, it amounted to nothing more than an advertisement of the terms on which the company were willing to make loans, and if desired by the borrower they should have been asked for, and not having been referred to in the application, and the mortgage having been executed, it constitutes the contract between the parties, and that no valid reasons exist for reforming the contract which was based upon such application.

It does not strike me that this comes within the class of cases in which a Court of Equity interferes by reforming the contract. The application in such a case as the present would not be under its jurisdiction to correct mistakes and decree that a written document be reformed. The foundation of a bill like that before us, is rather that it becomes a fraud on the part of the company to refuse to be redeemed on the terms mentioned in the circular, after inducing the borrower to accept the money on such a representation.

I am dealing now with the evidence as it impressed the learned Judge. Upon that evidence he has come to the conclusion that the circular was seen by the plaintiff, and it is not left to inference that he was induced to borrow in consequence of it, but there is the positive evidence of the witness that he would not have mortgaged his property for so long a period, had such terms not been held out as an encouragement for him to do so.

I think the public, to whom that circular was addressed, with the knowledge of the directors of the company, had a right to assume that there was a rule of the company which entitled the borrower to pay off at any time upon certain terms, and it would be inequitable in them to say that no such rule existed.

But it is contended that the plaintiff having become a member of the Society and subscribed to and agreed to become bound by the rules thereof, is bound by a rule subsequently made by the defendants, which empowers the directors to fix the rate of discount upon future payments in cases where members desire to pay off their loans in advance.

If it was in the power of the company to vary the liability of the borrowing members by any subsequent change in the rules, that should have been expressly stipulated in the security taken from the mortgagor.

It is true that as a member he agreed to be bound by the then existing rules, and by any rules and regulations of the Society, which on his part ought to be observed, performed, fulfilled and kept; and in the terminating societies which were called into existence when these bodies were first established, there was some reason probably in holding that as the duration of the continuance of the payment of the instalments under the mortgage depended on the prosperous working of the Society, they assumed a liability to abide by future regulations; they still remained partners as it were in the undertaking and participated in the profits and losses; but under this mortgage the plaintiff ceases to have any interest in the profits, and has paid a large premium for receiving his shares in advance, agreeing to repay the amount by certain stipulated sums, the only reference to the Society's rules being as to fines in default of punctual payment.

I think that without an express stipulation to that effect the mortgagor cannot be affected by rules subsequently made, but that full effect is given to the agreement when it is construed as applying to the rules for the time being

in force when the members accept the amount of their shares and agree to give a security for the repayment of the moneys advanced, even if they can under the system under which the operations of this Society are carried on be considered members, when they have received the amount of their shares ; but that at all events their liability should not be extended beyond the clear words of their contract, and that there is nothing on the face of this mortgage to shew that the mortgagor was to be subject to any but the then existing rules. For these reasons I think the judgment should be affirmed, and this appeal dismissed, with costs.

PATTERSON, J. A.—The plaintiff signed an application to the defendants for a loan of \$4,400, or, as expressed in the document, he offered his land “as security for [blank] shares (\$4,400) to be advanced to me from the funds of the Ontario Savings and Investment Society, for twenty years, *repayable* in yearly equal instalments, according to the said Society’s scale of repayments.” He executed at the same time a power of attorney to Mr. Bullen, the secretary and treasurer of the Society, to subscribe in his name for eighty-eight shares in the Society, and to sign the stock-book and rules in his name.

Upon this application the mortgage was prepared. It recited that the mortgagor was a member of the Society, having subscribed for eighty-eight shares of its stock, which the Society had agreed to pay him in advance on receiving that security therefor. The consideration money was stated to be \$4,400, and the proviso was for payment of \$9,785.60, in twenty yearly payments, together with all fines imposed by the Society on him on account of his shares, or of default in payment, according to the Society’s rules, and taxes and performance of statute labor.

The managers of the Society had been accustomed to advertise the advantages offered by their institution by sending “to the public,” as Mr. Bullen expressed it in his evidence, through the post office, great numbers of circu-

lars, containing, amongst other inducements to deal with them, the following announcement: "The following is the rule of this Institution: Loans can be paid off at any time, and a discharge of mortgage will be given. The rule of the Society being, when this privilege is taken advantage of, to charge three months' additional interest at the same rate at which the loan was made." This very explicit piece of information was introduced by a parade of the security which borrowers had in the publication of the loan tables, which rendered them "free from all possibility of extortion, deception, and fraud;" and by a further statement, which is worth referring to for the contrast between its terms and the gloss which Mr. Bullen attempted on his oath to give to the circular. "These loans," it is stated, "are made at a fixed and uniform rate. Borrowers sometimes desire to exchange or otherwise dispose of their property, or the means of repaying a loan occur or happen in various ways before the mortgage expires, and much inconvenience is frequently caused by not being able to obtain discharges of mortgages at any time; these difficulties frequently occur where loans have been made from private capitalists, trustees, or executors. The following is the rule of this Institution," &c.

The design with which a document of this kind was circulated could not, of course, affect its construction, as that must follow the meaning naturally conveyed by its language to those who read it. That meaning obviously is, that a loan made at the fixed and uniform rate set down in the tables might, by a rule which distinguished the mode of dealing of this Society from that of private capitalists, trustees, or executors, be paid off at a time and on a scale different from the uniform rate at which the loan was formally made, in case a contingency happened which made the borrower desire so to pay it off. One contingency expressly mentioned is that which has arisen; viz., the means of repaying the loan, which are now afforded by the power to borrow money at a cheaper rate.

There can be no reasonable doubt upon the evidence—

that the plaintiff became a borrower and made his mortgage in reliance upon the representations made in the circular. It is immaterial to inquire closely where he got his information, whether from a circular sent by post or from one which he saw with Porte, the valuator of the Society, who took his application. The issue of the circulars for the purpose of being read by borrowers would be sufficient to shew authority from the defendants to rely upon what they stated; but if evidence of prior authority to communicate the circular to the plaintiff were wanting, it would be supplied by the confirmatory act of giving him a copy with the pass-book he received after the loan was made.

The question is, whether the plaintiff can insist upon redeeming his mortgage according to the terms put forth in the circular? I should be sorry to find so grave a defect in our administration of justice as would be apparent from a negative answer. It would reverse the boast of the circular, and make it an instrument of "extortion, deception, and fraud."

I agree with my brother Burton in the grounds upon which he has based his judgment. I am also of opinion that the plaintiff's right to the relief he seeks may be sustained upon the strict footing of contract, either the contract evidenced by the mortgage itself, or a collateral and independent contract.

The mortgage refers to the Society's rules. They are indirectly referred to in the recital, which calls attention to the fact that the plaintiff subscribed for shares, and thus makes it proper to inform ourselves more fully respecting the fact so alluded to. We get the further information that he subscribed by the hand of Mr. Bullen, who acted under the power of attorney appended to the application, which itself was based upon the plaintiff's status as shareholder. The rules are also referred to directly in the proviso. I think the effect of the instrument is, to incorporate the rules of the Society as part of the contract, supplying by express stipulation what the

rules do not provide for, viz., the times of payment and amounts regulated by the loan tables. The rules are general, and apply to all borrowers and all mortgages; the instalments must necessarily be adjusted in each case by itself, and govern the particular contract, subject to the general rules.

I think we ought to hold, upon the evidence before us, that what is put forward in the circular as the rule of the Society, is one of the rules referred to in the mortgage. There is nothing in the statute C. S. U. C. ch. 50, which was the governing statute in 1874, to require, as against the Society, any more formal proof.

If authority for this position is wanted, it is, in my judgment, supplied by the case of *Salvin v. James*, 6 East 571. That was an action upon a fire policy executed as the deed of the defendants, who were trustees of the Sun Fire Office. The policy provided that as long as the plaintiff should pay the premium of £31 5s. yearly, on the 25th December, and the trustees for the time being should accept the same, the stock of the Society should be liable to pay to the plaintiffs such loss as they should suffer by fire, not exceeding £3,000, according to the exact tenor of their printed proposals, dated, &c.

The printed proposals contained an article providing that the insured should, "as long as the managers agree to accept the same, make all future payments annually at the said office within fifteen days after the day limited by their respective policies, upon forfeiture of the benefit thereof; and no insurance is to take place till the premium be actually paid by the insured." The fire had happened during the fifteen days and before payment of the renewal premium. The company resisted the claim. It had been decided in *Tarleton v. Staniforth*, 5 T. R. 695, under a similar policy and similar proposals, that until the premium was paid a person was not protected during the fifteen days. In consequence of that decision, the managers of the Sun Fire Office had published an advertisement informing the public "that all persons insured in this

office by policies taken out for one year or for a longer term are, and always have been, considered by the managers as insured for fifteen days beyond the time of the expiration of their policies ; but that this allowance of fifteen days does not extend to policies for shorter periods, which cease at six o'clock in the evening of the day of the expiration of the time mentioned in the policies." It was held that the advertisement had the effect of varying the third article of the printed proposals, and that it thus entered into the contract effected by the policy.

But if these reasons for reading the circular into the mortgage should not seem satisfactory, we have a distinct proposal made to the public in general and to this plaintiff, to whom it was conveyed, in particular, that any one who effects a loan with the Society and agrees to repay it with interest according to the scale of payments set down in the tables, shall be at liberty to commute the unpaid instalments at any time at a rate ascertainable under a rule of the Society. We have that proposal accepted by the plaintiff, who gives the mortgage which he now seeks to redeem.

There is thus created a contract upon a good consideration. I do not understand why it should not be specifically enforced against the defendants.

The cases of *Morgan v. Griffith*, L. R. 6 Ex. 70 ; *Erskine v. Adeane*, L. R. 8 Chy. 755 ; and *Mann v. Nunn*, 30 L. T. N. S. 526 ; 43 L. J. C. P. 241, are authorities for sustaining, in proper circumstances, parol agreements collateral to written agreements, and touching the same subject matter. Those cases were a good deal discussed in this Court in *Mason v. Scott*, 22 Gr. 592. They then seemed to me, and they seem to me still, to be cases which should be followed with caution, as they run very near the line which separates the collateral from the principal agreement. They are rather instances in which agreements were held to be collateral under circumstances not free from doubt, than decisions which establish any new doctrine. One feature exists, I think plainly in this case, which was relied on in

Morgan v. Griffith and *Erskine v. Adeane*, perhaps more strongly than in *Mann v. Nunn*, and that is the apparent absence of any intention to make the agreement which is now asserted to be collateral a part of the principal agreement.

The view I take of this, as a question of fact, is point blank opposed to the evidence given by Mr. Bullen. He says the intention was, if people wanted to take advantage of what he calls the *custom*, but what was, as he says unfortunately called a rule in the circular, they should have it inserted in the application and the mortgage. The whole tenor of the document negatives any such idea. It does not tell people that they may make it a part of their express contract that they may commute their payments. Such an announcement would not have raised the Society above the level of common money lenders. It asks them to borrow at the fixed and uniform rate, which is exhibited in order to avert all possibility of "extortion, deception, or fraud;" and assures them that they can be relieved from the letter of the obligation, if in the turn of events it becomes desirable, not by virtue of a stipulation to be inserted in the security, but under the rule of the Society.

Nothing could be more manifest, as it strikes me, than that this provision for an entirely contingent emergency was never meant to appear on the face of the mortgage. If the document were put forth with any such mental reservation on the part of the managers of the Society, which may perhaps be surmised in aid of Mr. Bullen's evidence, that secret intention could not, as I have before remarked, influence the construction of the language actually used.

Another view of the office of the circular has been suggested to me by a passage in the judgment of Lord Ellenborough in *Salvin v. James*, which reads as follows:—"That the true way of understanding the advertisement is as a correction of the article, and not as a substitution of a new provision in its place, will appear from this:—that the advertisement does not merely declare how persons insured

shall be considered, but how they always have been considered; which must necessarily refer to and respect the engagements the office had before made, that is, the policies and proposals which before the time of the advertisement had been executed and published by the office. It is in fact a declaration on the part of the office of the construction they at that time did and always before had put upon their own instruments: it is no substitution of a new engagement different from what they had formerly made, in the place of such former engagement, but an exposition of the sense in which the instruments forming those engagements had been understood by themselves, and were to be understood by others."

Here we have the defendants declaring the construction attached by them to the mortgage which they invite borrowers to give. The borrower is to covenant to pay at the tabular rates. The mortgage is to be void if those payments are duly made. The ordinary consequence of the execution of such a deed is, that the mortgagor cannot insist upon the mortgagee receiving his money at any earlier dates or in any other manner than as he has covenanted to pay it. That is the ordinary legal effect, there is no express stipulation on the subject. The Society declares by its circular that the contract is not to be so interpreted. The money lent must of course be repaid, and so must the interest for, at least, the time the money is retained. But nothing in the covenant to be given shall prevent the repayment at an earlier date. The construction put upon the engagement is, that the unpaid principal, with three months interest ahead, shall be taken as the equivalent of the payments set out.

It may be that this view does not present anything new, but is merely a repetition in another form of what has been already advanced. At all events it lends its aid to establish what was already abundantly clear, that the decree made in the Court below was correct.

The case of *Re Norwich Building Society*, L. R. 1 Chy. D. 481, is, I think, clear authority against the variation of

the contract by any rules made after its date. I do not make the Statute 37 Vict. ch. 50, sec. 3, C., or R. S. O. ch. 64, sec. 50, which authorize loans to persons who are not members of the Society, and declare that all borrowers shall be subject to all the rules of the Society in force at the time of their becoming borrowers, but not to any other rules, to intend by this latter provision to interfere with contracts between borrowers and the Society.

I agree that we should dismiss the appeal, with costs.

MORRISON, J. A., and GALT, J., concurred.

INGRAM V. TAYLOR.

Married woman—Interpleader.

The plaintiff, who had been married in 1864, cultivated land, living upon it with her husband and working it under his advice, one-half of which had, in 1874, been devised to her by the father of her husband, the other half having been in like manner devised to her son. In an interpleader action brought by her against an execution creditor of her husband :

Held, (affirming the judgment of the Court below, 46 U. C. R. 52), that the plaintiff was entitled to the crops on the whole farm as against the execution creditor.

THIS was an appeal from the Court of Queen's Bench in a cause therein, in which Jane Ingram was plaintiff, and David Taylor was defendant, and which had been tried before Patterson, J.A., without a jury, at the Autumn Assizes for Cobourg, 1880.

The appeal was against a decision of that Court discharging a rule *nisi* to set aside a verdict entered for the plaintiff, and to enter a nonsuit or verdict for the defendant, as to all the grain, hay, and crops claimed by the plaintiff, or such portion thereof as had been raised and produced on the east half of lot 30, in the 5th concession of Haldimand during the year 1880, which is reported in 46 U. C. R. 52, where the facts of the case and the grounds for the learned Judge's finding in favour of the plaintiff, are fully stated.

The appeal came on to be argued before this Court on the 17th of November, 1881.*

W. Kerr for the appellant. It is shewn that there was not a marriage settlement between the plaintiff and her husband; consequently the chattels now in question are, by common law and the marriage contract, undoubtedly the property of the husband, unless the Married Woman's Act, R. S. O. ch. 125, has had the effect of taking them from him and creating them separate property of the

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wife; this, it rests upon her to establish conclusively to be the effect of that Act. But unless sec. 7 has this effect no other section can be said to make them her separate property; and in the view of the learned Judge who tried the case, the facts did not bring the plaintiff within that section. He expressly negatives there being any "occupation or trade carried on by her separate from her husband," so as to bring her within the seventh section, and therefore the verdict should have been against the plaintiff, at all events so far as the verdict was given in respect of the crops raised on the son's half of the lot.

McCarthy, Q.C., for the respondent. The defendant will not be permitted in this proceeding to set up the *jus tertii* of the son, as all the lands were cultivated in a similar manner; and the plaintiff had been permitted by her husband to work the farm, and to deal with the produce thereof as her own separate property; and in fact she did carry on all the work on the place with her own means, as if she were a *femme sole*. *Slamming v. Style*, 3 P.W. 334, shews that in equity the husband would not be permitted to claim these goods by virtue of his marital rights; so neither can the execution creditor who claims under him: *Laporte v. Castick*, 31 L. T. N. S. 437; *Foulds v. Courtelett*, 21 C. P. 368; *Meakin v. Sampson*, 28 C. P. 355; *Irwin v. Maughan*, 26 C. P. 445; *Harrison v. Douglas*, 40 U. C. R. 410; *Allan v. Levisconte*, 15 U. C. R. 9; *Royal Canadian Bank v. Mitchell*, 14 Gr. 412; *Chamberlain v. McDonald*, 14 Gr. 447; *Mitchell v. Weir*, 19 Gr. 508; *Standard Bank v. Boulton*, 3 App. 93.

March 24, 1882. BURTON, J. A.—The plaintiff, a married woman, claimed the property seized, and the subject of this interpleader, as the product of a farm of 200 acres on which she resided.

As to the east half, although she occupied under the impression that she was the legal owner, it had been devised to her son, an infant.

The west half was devised to her by her husband's

father, under a will which became operative in November, 1874. She was married in 1866, and it becomes necessary to consider her right as to the products of these respective portions of the property separately.

Dealing first with the west half, if I understand the argument of the appellant's counsel correctly, it is, that notwithstanding section 3 of the Married Woman's Act, the right of the husband to the wife's land, which he would have enjoyed at common law, is not taken away: that under section 4 which applies to women married since the 2nd March, 1872, the right of the husband to interfere with the land of the wife, or to recover the rents, is clearly extinguished, and the land declared to be vested in the wife to be held by her for her separate use, free from any estate of the husband during her life time, but that is not the effect of section 3.

If otherwise, where was the necessity he asks, for amending the Act by section 4? The answer is not far to seek. The decisions of the Courts had established that the separate property referred to in the statute was essentially different from what is generally known as property settled to the separate use of a married woman, in the sense recognized in Courts of Equity, and it was no doubt the intention, whether it has been successfully carried out or not, to attach to this description of property that quality of separate estate, which by the judicial interpretation of the previous enactment had been denied to it. But I am not aware of any case which establishes that the common law marital right of the husband to the possession of his wife's land during their joint lives existed, in cases coming within section 3 of the Act.

It is not very material to inquire whether the husband did, notwithstanding the passing of that section, retain any estate or interest by virtue of his marriage in the real property of his wife during her life, as has been suggested may be the case, in *Emrich v. Sullivan*, 25 U. C. R. 107, because it must necessarily be a bare estate, not entitling him to the enjoyment of the land or the receipt of the rents

and profits without her consent, if any effect whatever is to be given to it.

No doubt under the Act of 1859, the estate of the husband by the curtesy is carefully guarded, and it may have been thought by the framers of the Act, that, as the husband had on the birth of issue capable of inheriting an estate by the curtesy initiate, it was desirable to remove all doubts as to the sweeping effect of section 3, by further declaring that such interest or any estate to which he was by virtue of his marriage entitled in the real property of his wife during her life should not be subject to his debts, reserving the rights of judgment creditors who had obtained judgment or execution before the passing of the Act.

The construction contended for would make that section of the Act of 1859 a dead letter. The learned Judge has found, upon evidence which I think could lead to no other conclusion, that the wife never consented to part with the control and disposition of this farm to her husband, and that there is no pretence, therefore, for the legality of the seizure of the crops grown upon the west half. As to the other half, the crops were no doubt raised by the wife in the same way as those on her own portion, with the assistance of her husband, but it is claimed that as to them the plaintiff can have no title as against the execution creditor. The husband it is claimed as guardian in socage would be entitled to the land and the profits during the minority, but no such case has been made out, even if that would assist the defendant. A guardianship in socage, it is said, only occurs when an infant is legally entitled by possession to socage lands by descent, and is in such of the infant's next of blood as cannot possibly become entitled to the land upon the infant's death. The parties here do not occupy the relative positions which would create the relationship—the infant does not take by descent, and the husband might become entitled on his son's death. We need not, therefore, trouble ourselves with this portion of the argument. The crops of the infant's share were in the possession of the plaintiff at the time of the seizure, and

that is sufficient as against any one not shewing a better title, which this defendant has not done.

The appeal should therefore be dismissed, with costs

GALT, J.—This was an interpleader tried before Patterson, J. A., who found a verdict in favour of the plaintiff. The defendant applied to the Court of Queen's Bench to enter a verdict in his favour or nonsuit, which rule was discharged.

The plaintiff is a married woman, the defendant is an execution creditor of her husband, and the property seized in this case was all the wheat, all the barley, all the oats, all the pease and all the hay raised during the year 1880, on lot 30 in 5th concession, Haldimand. The plaintiff was married to Robert Ingram, the execution debtor, in 1864, and is the owner of the west half of the said lot, the east half having been devised to the eldest son of the said Robert Ingram, who is an infant of between eight and ten years of age. The title of the plaintiff and of the infant is under the will of John Ingram made in July, 1873, the testator having died in 1874. The plaintiff and her husband lived together on the said lot. There is one building on the east half, a driving shed. There is a house and wood-shed and two barns and three hay sheds on the west half. All the grain &c., the subject of the present suit, is stored in the barns and sheds on the west half, although some of it was raised on the east half. The learned Judge gave a considered judgment on all the facts of the case, in which he says :

“The farm seems to have been occupied with the understanding, as I have mentioned, that it was the wife's right to occupy as between her and her husband. The object of the devise in the peculiar shape that it took, *i. e.*, devising the land not to the son of the testator, but to his wife and to his children, I have no doubt was what was indicated by the evidence, that it should not be under the control or subject to a judgment which existed against the son at the time of the testator's death, and which is the same judgment upon which this execution has now been issued, and which I suppose from something said was obtained in an action for seduction. I have no doubt that was the object of the peculiar shape of the devise. Although there is no direct evidence as to that, still it strikes me that was what dictated the shape the devise took. If that were so,

and I have no doubt it was understood by all the parties interested, that was why, and it affords reason, if any reason outside of the direct evidence in the case were necessary to be looked for, why they were on the alert in all their transactions, and why they might be on the alert to preserve the position of this being the wife's property and not the husband's. The question is, whether the mode of dealing, in respect to the working of the farm, has had the effect of making the crops the husband's to the extent of enabling the creditors to seize them as against the wife. My opinion is at present very decidedly against the application of the seventh section of the statute. I think it is quite clear that these were not her wages or earnings in the sense in which those words are used in the statute. I think it is also quite clear that she was not carrying on any occupation or employment separate from her husband. If the working of the farm was an occupation or employment or trade, which I believe is the wording, within the meaning of that clause at all, it was not carried on separate from the husband, because, whatever she did about the place was simply what any farmer's wife would do about the place of her husband, in fact, although the husband was not doing the work on the place of an able man, still whatever he did was done upon the place, and what he did was more than she did, so far as actual labour or occupation or carrying on the farm was concerned. I do not think there was an occupation or trade carried on by her separate from her husband, so as to bring her within the seventh section.

"The question in my mind turns upon her being the owner of the land, and making no distinction between the part that was her's and the part that was the son's, and the husband being concerned in the working of it to the extent the evidence has shewn. I think the work of the farm went on very much as the work of any farm, where the farmer is a lazy, do-little kind of a man, would go on. He did very little about the place, just as any other lazy man might do, but still whatever work he did was done there.

"I think the parties all apprehended that the farm was hers. It was a matter well and publicly known. The men who worked the farm knew that by being told it. Nichols knew it as well as the rest, not from being told as to how the will had disposed of the property, but from the direct evidence of the parties while he was working there. There is no doubt from that evidence it was well-known the land had been left in this particular way, and the place was hers. I think the work done upon the place was done by persons who were employed by the intervention of the husband, but always in concert and in connection with the direct understanding with the wife that it was her farm, and she was the owner for whom they were actually working. I think Mrs. Ingram's evidence upon the whole gives as fair a statement of the position as any of the evidence which has been given here. I do not think it is really added to by any of the evidence given afterwards."

I fully agree with the opinion expressed by him. The question then is, whether under such an existing state of

facts the crops raised on the west half, (I will refer to the east half presently,) are liable to be taken in execution at the suit of a creditor of the husband. By R. S. O. ch. 125, sec. 3, "Every woman who married between 5th May, 1859, and 2nd March, 1872, (both inclusive), without any marriage contract or settlement," (as was done in this case,) "shall and may, notwithstanding her coverture, have, hold, and enjoy all her real property whether belonging to her before marriage or acquired by her by inheritance, devise or gift, or as heir at law to an intestate, or in any other way after marriage, free from the debts and obligations of her husband, and free from his control or disposition without her consent, in as full and ample a manner as if she continued sole and unmarried." It appears to me the Legislature could not have used any expression more plain and distinct to indicate their intention, that during the life of the wife she should have the enjoyment of her real estate free from the debts and obligations of her husband, and from his control and disposition without her consent, and therefore, although not so expressly stated, to abrogate all his marital rights which he might have during her life, but leaving his reversionary rights unaffected. This was afterwards changed by the statute of 1872, which it is unnecessary to consider. It appears to me if in a case like the present the crops raised on the land of the wife are to be considered as the property of the husband and liable for his debts, we must hold that the husband and wife cannot live together on her property, if the farm is to be carried on by her under his advice and occasional assistance, which is certainly contrary to the express words of the statute.

It was very strongly pressed upon us by Mr. Kerr that this case was determined by the judgment in the case of *Lett v. The Commercial Bank*, 24 U. C. R. 552, and that unless we overruled that decision this appeal must be allowed. The facts of that case, however, are very different from the present. The plaintiff was not seized of the lands on which the crops had been raised, she claimed under the

will of her father, who had devised all his personal property to her absolutely; but he devised all his lands in Blenheim in fee to trustees, and power was given to the trustees to make leases not to exceed twenty-one years, by the daughter's consent in writing, &c. And Draper, C. J., in his judgment says: "As to the growing crops, the case appears to be that the claimant and her husband were living together on land devised by her father to trustees for her use. The will, while silent as to her occupation of the land or of any portion of it, makes express provision for the trustees granting leases at the best rent, and gives directions as to certain things which are to be required from the tenants, and makes it the duty of the trustees to pay over the rents, issues, and profits to the claimant or her appointee. The occupation of the land may not be necessarily inconsistent with the testator's intention, but he certainly has made no express provision for it. In the absence of any evidence to the contrary, it seems to me the reasonable presumption is, that Dr. Lett was tenant of the land on which these crops were growing. If he is in fact the occupant farming the land the growing crops were his, and were liable to an execution against him." It was upon this assumption that case was decided. The facts in the present shew an entirely different state of things. It was urged before us, and was doubtless the intention of the testator, that the husband Ingram should have no interest whatever in the land. It was worked by the wife who occupied it under the express terms of the devise, and the crops were raised principally, if not exclusively, by men hired and paid by her. I see nothing therefore in Lett's case which militates against the decision of the Court of Queen's Bench.

It must also be borne in mind that one of the learned Judges who took part in Lett's case is the present Chief Justice of the Queen's Bench Division; and it must be known to every one who is acquainted with that learned Judge, that if he had considered himself precluded in any degree by the former decision he would have said so, but on the contrary, he says: "The evidence given in the present case I think takes it out of the operation of

Lett v. Commercial Bank. Since that case was decided we have had further legislation in favour of preserving, as far as possible, the rights of the wife to her own property as against her husband's creditors, and a large number of cases have been decided fully recognizing the principle established by the Legislature, and tending to widen rather than to narrow the rights of married women." I confess it appears to me unfortunate the learned Chief Justice in Lett's case should have assimilated the provision made by the Act for the protection of married women to a "marriage settlement." Such a settlement, as generally understood, requires the interposition of trustees to prevent the effect of the marriage in giving the control of the wife's property to the husband, whereas the Legislature has expressly declared: That every married woman who married "without any marriage contract or settlement shall and may, notwithstanding her coverture, have, hold and enjoy all her real property * * free from the debts and obligations of her husband, and free from his control or disposition without her consent, in as full and ample a manner as if she continued sole and unmarried," and if we were to hold that where, as in the present case, the real property consisted of a farm on which she resided with her husband and her children, the crops raised thereon were liable for the debts of the husband, debts moreover contracted long before the land became the property of the wife, the provision of the law made for her protection becomes a nullity, and she must cease to occupy it or be deprived of advice and assistance from the person who of all others is the proper party to afford them. In my opinion this branch of the case must be decided in favour of the plaintiff.

As to the crops raised on the east half I agree with the judgment of the Court below. It is true this portion of the land was cultivated by the plaintiff in the same manner as the west half, under a misapprehension as to her right so to occupy it under the will of the testator, and the produce was stored in the same barns and sheds as the rest. It was, therefore, in her

possession, and certainly as respects the right of the defendant to seize and take it from her under an execution against her husband, who had and made no claim to it whatever, it appears to me she was rightly in possession. This is not the case of a plaintiff claiming goods seized by the sheriff, to which she could make no claim, unless she had and could establish a legal title; but the issue to be tried was, whether "the property was hers as against the defendant," who had no right whatever unless he could shew they were goods liable to seizure under an execution against Robert Ingram; and as I am of opinion they were not, I think this should be decided in favour of the plaintiff.

SPRAGGE, C. J., and MORRISON, J. A., concurred.

THE INTERNATIONAL BRIDGE COMPANY v. THE CANADA
SOUTHERN RAILWAY COMPANY, AND

THE CANADA SOUTHERN RAILWAY COMPANY v. THE INTER-
NATIONAL BRIDGE COMPANY.

Bridge company—Corporate powers—Tolls—Reasonableness of tolls—Reference to Master of questions proper for Court—Duty of junior counsel.

Held, affirming the judgment of the Court below (28 Gr. 114), that it is incident to the corporate powers of a corporation of the character of the International Bridge Company, incorporated under 20 Vict. ch. 227, and 22 Vict. ch. 124, to demand payment of tolls from railway companies for the user of their bridge.

Held, also, that the tolls payable for the passage of trains are not fixed by the said Acts.

The dividends paid by the Bridge Company were adopted at the Bar as a test of the reasonableness of tolls charged. It was shewn by the evidence of eminent engineers that the construction of the bridge was an exceptionally difficult undertaking, that the bridge when complete was exposed to extraordinary risks and dangers, and that a large sinking fund was necessary to provide for unforeseen contingencies; and the Court was satisfied that the omission to provide such a fund would be improvidence on the part of the directors.

Held, that a sinking fund was, therefore, a proper and reasonable charge against the annual income: that upon the evidence the Court could not declare that a point of unreasonableness had been reached when they should relieve against overcharge, assuming it to be competent to the Court so to declare and relieve: that a dividend of six per cent. per annum on capital laid out in such an enterprise would be unreasonably small, but that it was not necessary for the Court to say what would be reasonable.

Where a question is directly raised by the pleadings, and is distinctly presented to the Court for its decision, and evidence has been given upon it in order to obtain the judgment of the Court, it will not be referred to the Master for his decision.

Held, therefore, that it was not proper to refer to the Master the inquiry as to the reasonableness of the tolls charged.

Junior counsel are not at liberty to take positions in argument which conflict with the positions taken by their leaders.

This was an appeal in the first named cause by the Canada Southern Railway Company from a decree of the Court of Chancery, pronounced on the 24th of August, 1880, whereby it was

Declared that the defendants were "liable to pay to the plaintiffs tolls for the use of the plaintiffs' bridge at the rate settled by the directors of the plaintiffs' company, namely: For each passenger carried in a railway car, ten cents; for each freight car, whether box or platform, containing merchandize of any description, one dollar; for each freight car, whether

box or platform, not loaded, fifty cents ; for² each locomotive not running a train or connected with trains passing across the bridge, seven dollars and fifty cents ; for each new passenger car, two dollars and fifty cents ; for each new freight car, box or platform, one dollar and fifty cents : for each conductor's van, one dollar. No charge for engines hauling trains across the bridge, or going to fetch a train in either direction, provided such engines are *bonâ fide* going for the purpose mentioned ; no charge for passenger cars carrying passengers, and for which the rate of ten cents is to apply. But for every other car on a passenger train, such as baggage, post-office, &c., one dollar, whether full or empty, less a rebate on the basis of twenty-five per cent. on any sum above fifty-five thousand dollars and less than one hundred thousand dollars in each period of twelve months, and a rebate of thirty-three per cent. on any sum over one hundred thousand dollars in each period of twelve months ;" and a reference was directed to the Master to take the necessary accounts, and tax the costs of the plaintiffs, which the said defendants were ordered to pay.

In the cause secondly mentioned, which had been instituted by the plaintiffs (The Railway Company) to be relieved from the payment of the tolls claimed by the Bridge Company in the first suit, and which was dismissed, the plaintiffs appealed.

Crooks, Q. C., and Cattanach, for the appeal.
S. H. Blake, Q. C., and W. Cassels, contra.

The appeal came on for argument on the 11th, 12th, and 13th of January, 1882.*

The other facts of the case, as also the points argued by counsel, appeared sufficiently in the judgment.

March 24, 1882. SPRAGGE, C. J.—The suit of the bridge company is for the recovery of tolls between the 31st of October, 1877, and the 31st of December, 1878 ; and the decree declares that the railway company is liable to pay to the bridge company tolls for the use of the bridge at the rate settled by the directors of the bridge company, namely :—And the decree then sets out the rates, which it declares the railway company liable to pay ; and refers it to the Master to take an account of the amount due in

* *Present.*—SPRAGGE, C. J., BURTON, PATTERSON, and MORRISON, JJ. A.

respect of such user of the bridge from the earlier to the later of the above dates, having regard to the declaration contained in the decree, with interest; and orders payment of the amount to be found due by the Master. The decree contains no declaration or order in respect of tolls accruing due after the later of the above dates. It is no *res judicata* as to anything subsequent to 31st December, 1878; and is not in any shape binding upon the railway company as to anything subsequent to that date.

In the suit in which the railway company are plaintiffs and the bridge company defendants, the same points are raised as in this suit, and the two were argued together.

Mr. Crooks conceded that it was incident to the corporate powers of the bridge company to require payment of tolls from railway companies for the user of the bridge, and to fix the amount of tolls to be paid for such user. This, indeed, was denied by his junior counsel Mr. Cattanaach. We think that junior counsel are not at liberty to take positions in argument which conflict with the positions taken by their senior counsel. We did, however, allow Mr. Cattanaach to state and argue his proposition; which, I may say shortly, I consider wholly untenable, as did certainly his senior counsel, who in his reply reiterated the position he had taken upon that point in the opening of the case. Not only is this power incident to the corporate powers of the company; but the whole scope of the Canadian Acts of incorporation, 20 Vict. ch. 227, and 22 Vict. ch. 124 indicate the mind of the Legislature that the company was to have such power; and the language of sec. 16 of the earlier Act is large enough to confer such power. It may at any rate be safely rested upon the ground upon which it is placed by Mr. Crooks, that it is incident to the corporate powers of a corporation of that character.

But Mr. Crooks, while conceding to the bridge company the possession of power to fix tolls, contends that this power is qualified by the implied condition, that the tolls fixed must be reasonable; and the ground upon which he bases this contention, is that the franchise of the com-

pany, and the structure built and used under and in pursuance of their franchise, are *publici juris*; and Mr. Crooks cites high authority for his position. He refers among other authorities to Lord Hale's treatise *De Jure Maris*; and the treatise of the same learned writer *De Portibus Maris*, to Mr. Justice Strong's observations upon the nature of a franchise and structure of a similar character in *The Attorney-General v. The Niagara Falls Suspension Bridge Company*, 20 Gr. 34, 490; to *Allnut v. Inglis*, 12 East 527, the London Docks wine case, and which is referred to in the learned and elaborate judgment of C. J. Waite in the case of *Munn v. Illinois*, 4 Otto 113. We are also referred to the language of Mr. Justice Blackburn in the case in the Lords of the *Great Western Railway Co. v. Sutton*, L. R. 4 H. L. 236. The earlier portion of the learned Judge's answer to the question propounded by the House is apposite to this point.

The question is a very interesting one; but our decision in his favour would not help Mr. Crooks in this case, unless he is able to shew not only that the tolls fixed by the company must be reasonable, but that they are in fact otherwise than reasonable.

Before discussing the question of the reasonableness of the tolls fixed by the company, I will notice a contention of Mr. Cattnach that the tolls are already fixed by statute. If he is right, the question of reasonableness does not arise. He founds his argument upon the second section of the Incorporation Amendment Act of 1858, 22 Vic. ch. 124, which runs thus: "Whenever the bridge authorized by the said Act (the Act of 1856) shall be complete for the passage of ordinary trains and carriages, the said company may erect toll gates, fix and collect rates of tolls, and make such erections as the directors may deem expedient to guard the entrance to the said bridge, and prevent persons from entering upon or passing the same without paying such tolls; but no greater tolls than the following shall be charged for entering upon or passing over the said bridge," that is to say:

For each foot passenger; twenty-five cents; for each horse and rider, fifty cents; for each horse and single carriage, sixty cents; and an addition of eighteen cents and three-fourths of a cent for each other passenger actually travelling in such carriage; for each other passenger the sum of twenty-five cents; for each double carriage and two horses, one dollar; and eighteen cents and three-fourths of a cent for each passenger actually travelling therein, and twenty-five cents for each additional horse attached to such carriage; for sheep, one and a-half cent per head; for swine, two cents each; for neat cattle, six cents per head; for each horse in droves or in cars, twelve cents and a-half.

Mr. Cattnach says "ordinary trains" means ordinary railway trains, and that the word "cars" in the last item of charge means railway cars; and that the whole tariff is intended to apply to railway traffic. On the other hand, it is suggested that the word trains is a mis-print for teams, and that in the corresponding tariff in the American Act in relation to the same bridge, the word in the same connection is not trains, but teams, and that almost every word in the section shews that it was intended to apply to tolls for the passage of persons on foot and in ordinary carriages, and not to the passage of railway trains. One cannot read the items of charge without seeing that this is so—"foot passenger," "horse and rider," "horse and single carriage," "double carriage and two horses," addition "for each other passenger actually travelling in such carriage," to which may be added the language of the earlier part of the section "prevent persons from entering upon or passing." Granting that the primary meaning of the word "trains" used in connection with crossing the bridge is railway trains, the question is, whether that meaning is not controlled by the context. I think that in this case it certainly is, and that the context shews that not railway trains but ordinary vehicles were intended. I may add that the word "droves" in the last item of charge may be set against the word "cars" in the same item.

All this is made more clear by other parts of these two Acts. The last clause of the second Act provides: "This Act

shall be deemed a public Act, and shall be construed as one Act with the Act amended by it." Turning then to the earlier Act we find it enacted by sec. 14, that the "bridge shall be as well for the passage of persons on foot and in carriages, and otherwise, as for the passage of railway trains." And we find by sec. 16 that it was contemplated that the bridge might be completed for one purpose before it was completed for the other; for we find in that section provisions in relation to its being so completed as to admit of the passage of railway trains. Then coming to the second Act, we find in sec. 2: "Whenever the bridge authorized by the said Act shall be complete for the passage of ordinary trains and carriages." Bearing in mind that the two Acts are to be construed as one Act, can we say that sec. 16 of the one and sec. 2 of the other relate to the same thing—to the completion of the same part of the contemplated double structure? Did the draftsman of the second Act with, we must assume, sec. 16 of the first Act before him, intend to repeat with some verbal differences what had been enacted already by sec. 16? Reading the two Acts as one Act we see that the proper place for sec. 2 of the later Act is next after sec. 16 of the earlier one; and it will be very plain that sec. 16 relates to the passage of the bridge by railway trains, and sec. 2 to the passage of the bridge for the other intended purpose of its construction, its use by persons on foot and in carriages.

It is not necessary to refer to the canon of construction invoked by Mr. Cattnach in interpreting railway and canal Acts, for I think that, under no reasonable construction of legislative language could sec. 2 be interpreted as meaning what the learned counsel contends that it does mean. And we find besides that the Legislature enacted (Act of 1857, sec. 22) that these Acts should be construed according to the rule established by the Interpretation Act; and this I apprehend takes these Acts out of the canon of construction contended for.

I come now to the question of reasonableness, upon which Mr. Crooks relies. He takes as a test the percentage

yielded to the shareholders upon their capital expended upon the bridge and its approaches, and other expenses incidental to the undertaking. I think at the outset he takes too narrow a view of the cost to which the company was put in carrying out their enterprise. He proposes to deduct three items, which he says form no part of the bridge structure and its approaches strictly so-called. The first of these items is a sum of \$51,909 "expenditure by old companies." I am not informed how exactly this item stands, but I believe it is not questioned that this expenditure was incurred; and that it was assumed, if not paid, by the present company. The other two items, I think, admit of no question. One is "interest on capital during construction, \$234,232," which means, as I understand it, interest on moneys expended before there was any return. The item appears to me to be perfectly reasonable and proper, as does also the third item, discount, interest, and stamps, \$145,813. It was, I take it, money paid on these three accounts. The whole cost (not admitting these deductions), as appears by the accounts and other evidence, was in the neighbourhood of two million dollars.

The parties differ widely as to the dividend yielded by the tariff of charges. Mr. Crooks makes it (reducing the capital by the items he objects to) about 17 per cent. Mr. Cassels, on the other hand, taking the capital at two millions, makes the dividend not to exceed 8 per cent. if spread over the whole period since the completion of the bridge, or, taking the year 1878 by itself, not to exceed 10 per cent.

It is pointed out in the evidence of Col. Gzowski, of Mr. Brydges, and of Mr Hannaford, that not only was the construction of the bridge an exceptionally difficult undertaking, but that, now that it is completed, it is exposed to more risks and danger than perhaps any other railway bridge in the world; and all these gentlemen concur in the opinion that a fund should be set apart, which they call a sinking fund, to answer the expenses which may be occasioned from time to time, by accidents to which the bridge in their estimation is subject. Mr. Brydges, upon that

point says, that he has travelled on most of the railways, and seen most of the great railway bridges; that he knows no bridge so exposed to dangers as this bridge; that he knows of none that compares with this bridge in point of danger and risk; and he says that he does not think it could be safe, looking at the structure and the position which it occupies, and the dangers it has to meet, that it could start with less than from one and a half to two per cent., to be continued until it amounted to sufficient to build the bridge. He is asked, "and to be accumulated with the proceeds of it?" and answers, "Yes, subject to deduction, from time to time, for any accidents." He is asked: "That is quite irrespective of any wear and tear, maintenance and repair?" and answers: "Entirely so." Mr. Hannaford, the engineer of the Bridge Co., during the construction of the bridge and since, after describing the many accidents and dangers to which the structure is exposed, is asked if he deems it possible to form anything more than a conjecture as to the sinking fund for extraordinary contingencies, such as had been alluded to; and he says he would be content to take the views of Col. Gzowski and Mr. Brydges upon it; and adds, "but as engineer, I would like \$1,000,000 placed in charge as a rest account as early as possible; as the engineer in charge, I would think it desirable. * * I am sure," he adds, "mishap may come some day." And being asked as to the danger of one of the spans being carried away "by some eccentric vessel." He says: "I may say, in addition to that, that there are risks in this way; if one vessel comes down against the pier, and if she runs on sideways, followed by two or three others in succession, then something has got to give away, and possibly the piers," and this he repeats, putting the case of several vessels towed by one propeller, one of them getting "broadside against the pier and the others in succession ramming against them. I would not say a pier could stand such ramming."

One cannot read the evidence without being struck with the incessant vigilance required to guard against "mishap;"

with the accidents that have occurred in spite of the exercise of vigilance; and the multitudinous dangers to which the structure is at all times exposed; and being struck also with the many necessary calls upon the funds of the company, some of which certainly have not been taken into account in the calculations of witnesses for the railway company, who have estimated the working expenses of the bridge company.

The evidence convinces me that not only would the creation of a sinking fund (I adopt the term used by the witnesses) be a reasonable and proper charge against the annual income of the company, but that the omission to maintain such a fund would be an improvident act on the part of the directors.

I have quoted at some length from the evidence of the gentlemen whom I have named (and I may say here that evidence entitled to more weight could not be offered to a Court) for two reasons principally: first, to shew that the constituting of such a fund as they speak of would be reasonable and proper; and next, that in estimating what is a reasonable charge against railway companies for the user of the bridge, based, as Mr. Crooks puts it, upon the dividend or interest which it is reasonable that the shareholders should receive upon their capital invested, it is proper to take into account that their capital—the bridge itself—is not free from danger, and that accidents to such a structure are of a very serious kind. We have it in evidence that to re-place a span would cost about \$100,000. Before a reserve fund is made up, accidents may occur, the repair of which may involve expenditure to so large an amount as to make calls upon the shareholders necessary, and possibly for some time make the payment of dividends impossible. Such a contingency may properly be taken into account.

Reading the evidence of Mr. Gzowski, and the very interesting narrative that it contains of the obstacles and difficulties encountered in the construction of the bridge, and the skill and perseverance with which he met and surmounted them, the evidence of Mr. Brydges, who was

president of the company during its construction, and until the summer of 1874, and the evidence of Mr. Hanua-ford, the company's engineer then and ever since, one cannot fail to see that it is impossible to predicate of this bridge an immunity from disaster. So far as skilful and conscientious work could give it permanence, no one can doubt that it has it; but Mr. Brydges says that no other bridge that he had seen, compared with this one in point of danger and risk. One of my learned brothers referred to the Tay bridge, which, since Mr. Brydges gave his evidence, has been swept away. It was regarded as a monument of engineering skill, but its destruction has shewn that the elements are more powerful than any work of man, and the International bridge is certainly exposed to not less danger than was the bridge across the Tay.

To speak of six per cent. upon capital laid out in such an enterprise, is most unreasonable. It is not necessary to say what we should think reasonable. But assuming it to be competent to the Courts to say when the point of unreasonableness has been reached, and to relieve against overcharge; we are unable to say that in this case that point was reached during the period with which we have to deal in this case.

I find that I have omitted to notice one point contended for in the argument of Mr. Crooks. The point is, that if he has not by the evidence already given, proved that the Bridge Company's tariff of charges is higher than is reasonable, he has at any rate laid a foundation for an inquiry before the Master as to the reasonableness of the tariff. Upon that head, I have only to repeat what I said at the hearing, that the question was one directly raised by the pleadings, and is one of the principal grounds upon which the railway company come into Court; and that it is proper for the decision of the Court. To refer it to the Master would be to transfer to the Master for his decision a question which is distinctly presented to the Court for its decision, and upon which both parties have given evidence, in order to the obtaining of the judgment of the Court upon

it. I have constantly refused, when sitting in the Court of Chancery, to refer to the Master questions of this nature, raised as they have been raised in these suits, and I think that the course that I have thus uniformly taken is the correct one.

I should say also, looking at the pleadings and the evidence in these suits, that the railway company appears to have given evidence in order to the decision of this question by the Court; and, as I should judge, all the evidence that they had to give, or were advised to give; and that it is only when they find their evidence confronted by other evidence, and that upon the whole evidence their case, upon this point, is a weak one, that they ask that the decision of this question should be transferred from the Court, the proper forum for its decision, to the Master's Office, which I repeat is not in my judgment a proper forum for its decision.

In my opinion, the decree is right. It may be that the railway company failing in the principal object of their bill, may not care to take the reference which the decree gives them.

BURTON, and PATTERSON, JJ.A., concurred.

MORRISON, J.A., was absent from illness when judgment was delivered.

NORRIS V. MEADOWS.

Mortgage—Purchase of part of mortgaged estate—Purchaser.

M., who was the owner of Whiteacre and Blackacre, both subject to incumbrances of \$1,600 and \$500, sold Whiteacre to C. subject to the \$1,600 mortgage, with covenants for title, save as to that mortgage, the mortgage debt in reality being the consideration or purchase money therefor. M. afterwards sold Blackacre to N., subject to the \$500 mortgage, which conveyance also contained absolute covenants for title, the payment of the \$500 being taken as part of the consideration. Default having been made in payment of the \$1,600 mortgage, the mortgagee proceeded to a sale under the power, and N. became the purchaser of both parcels with a view of protecting himself, and thereupon took proceedings to compel M. and the representatives of C. to pay the amount due on the \$1,600 mortgage.

Held, affirming the judgment of the Court below (28 Gr. 334), that there was not any privity between the plaintiff and C.'s representatives, and that the demand remained with M., the original vendor, against C.'s estate.

THIS was an appeal from an order of the Court of Chancery pronounced by Blake, V. C., on allowing the demurrer of the defendant Costello to the bill of complaint of George Abbott Norris, seeking to compel the payment of the amount due upon a mortgage for \$1,600 upon a lot conveyed by the defendant Henry J. Meadows to one Michael Costello the testator in the pleadings named, and which was afterwards conveyed to the defendant George C. Matchett by Mary Costello, the widow and devisee of the testator. The pleadings in the cause appear in the report of the case (28 Gr. 334) and the judgment. The case came on to be argued before this Court on 25th of May, 1881. *

Bethune, Q. C., and McLean, for the appellant.

E. Blake, Q. C., contra.

The contention of the appellant was, that upon the facts as set forth in the bill he was entitled to a decree for payment of the mortgage by the estate of Michael Costello.

The respondent insisted that as there was not any privity between the appellant and respondent, and the claim of the appellant was one against the land, and not against the

* *Present.*—SPRAGGE, C.J., BURTON, PATTERSON, and MORRISON, JJ.A.

respondent personally, the only person who could be heard to assert the claim set up by the bill was the defendant Meadows under the covenants entered into by the testator. *Mathers v. Helliwell*, 10 Gr. 172; *Forbes v. Adamson*, 1 Ch. Cham. 117; *Parker v. Glover*, 24 Gr. 537; *Joice v. Duthie*, 5 U. C. L. J. 141, were referred to.

March 24, 1882. SPRAGGE, C. J.—What is sought by this bill is a personal remedy against the estate of Costello; and the demurrer is by one of the executors of that estate.

Upon the sale by Meadows to Michael Costello, deceased, it became the duty of Costello to indemnify his vendor, against the mortgage of the Canada Landed Credit Company upon the land purchased, created by his vendor; but the bill does not shew that Costello came under any personal obligation to the mortgagees; and it states that there was no covenant by Costello to his vendor to pay off that mortgage.

As between Meadows and Costello, there existed, as I thought and held in *Campbell v. Robinson*, 27 Gr. 634, the relation of principal and surety, with of course the duties and liabilities growing out of that relation. As between Costello and the mortgagees, there was no personal liability; as has been held in several cases in England and in this Province.

That was the position of the parties when Meadows made a sale of other land to the plaintiff, that other land being under mortgage to the same mortgagees for \$500. The allegation is, that when the mortgagees realized their securities by sale of the mortgaged premises comprised in both mortgages, the plaintiff was compelled, in order to protect his own interest in the parcel purchased by him, to purchase both parcels. If Meadows had not sold to the plaintiff, and the mortgagees had sold as they did, and Meadows had been the purchaser at the sale of the parcel he had sold to Costello, making such purchase necessarily in order to protect his interest in the other parcel mort-

gaged, I should say that he might properly file his bill for such relief as is sought by the plaintiff in this suit.

But, assuming that the vendor would have such right of suit, does it follow that a person in the plaintiff's position has? If there had been a covenant by Costello to Meadows to pay off the \$1,600 mortgage, or to indemnify Meadows from claim by the mortgagees, it would be a covenant in gross only, not a covenant of which the plaintiff could avail himself, and I apprehend that an equity between the parties entitling Meadows to that which he would be entitled to under such a covenant would be personal only, and not available to the plaintiff.

Another obstacle in the plaintiff's way is, that he has taken from his vendor, Meadows, a covenant against incumbrances, and cannot avail himself of any equity which may arise independently of that covenant.

I regret to be obliged to come to the conclusion that the plaintiff is not entitled in a Court of Equity to the remedy sought by his bill against the estate of Costello, for upon the same reasoning he would not have been entitled to a personal remedy against Costello himself; although it has been by the default of Costello that he has been put to the alternative of either losing his own land, or purchasing both parcels. I say this of course assuming the allegations in the bill to be true.

The doctrine in regard to privity, and the absence of privity being a bar to direct relief, is in many cases a difficulty in the way of a remedy between parties, where but for that doctrine a direct remedy, which would be obviously just between the parties, might be given. In some classes of cases the doctrine has been interfered with by the Legislature to the great advantage of litigants. The introduction of garnishee proceedings, is a notable instance of this; and the allowing the assignee of a chose in action to sue at law is another instance. It may be well to consider whether the doctrine does not work injustice in other cases, to which it now applies, and where a direct remedy might be safely given.

My conclusion in this case is, that the judgment appealed from must be affirmed.

BURTON, J. A.—This suit has at least the merit of novelty, and it is not surprising that no authority has been found for the plaintiff's contention.

The defendant Meadows owned two parcels of land, one of which contained 100 acres, the other 50, subject to two mortgages, one for \$1600 and the other for \$500.

He sold the 50 acres to Michael Costello, the \$1600 being included in the purchase, and his deed to Costello contained absolute covenants for title save that mortgage. This was on the 24th August, 1876.

There was no covenant on the part of Costello to pay this mortgage or to indemnify Meadows from its payment, nor does it appear that the land was in terms conveyed subject to the payment of the mortgage. So far as appears upon the pleadings, it was excepted from the covenants, but nothing is said in the deed as to the liability of either party to see to its discharge. In point of fact the mortgage money and interest was the purchase money for this 50 acres.

On the 10th November, 1877, Meadows sold and conveyed the 100 acres to the plaintiff. This deed contained absolute covenants for title, but it was fully understood between the parties that the plaintiff was to assume the \$500 mortgage.

The 50 acres, which was devised by Costello to his wife, was eventually sold by her to the defendant Matchett, who covenanted with her to assume and pay off the \$1600 mortgage.

The other defendants are the executors of Michael Costello's will. Default was made in payment of the \$1600 mortgage, and the property brought to sale under the power of sale; and in order to protect himself, the plaintiff purchased both properties at a price sufficient to cover both mortgages.

The defendant Costello, who is sought to be made liable as

executor of Michael Costello, is the only one of the parties who demurs, and it is unnecessary to complicate the case with the subsequent sale to Matchett, but only to consider how the case would have stood if the mortgagees had attempted to foreclose or sell the lands comprised in these mortgages in the lifetime of Costello, or before the sale to Matchett.

If the deeds alone were to be looked at the first purchaser, Costello, would have had an equity to insist on the lands remaining in the hands of his vendor, and which subsequently passed to the plaintiff, being first sold; but taking the view most favourable for the plaintiff, and reading the deed to Costello as if it had been expressed as conveying the land subject to the mortgage for \$1,600, that would amount to an implied agreement on the part of Costello to indemnify his vendor, and would deprive him of the right to cast the burden on the plaintiff's land, but I am at a loss to see how the plaintiff could have any personal remedy against him. I would go further, and even assuming that the deed had been properly framed, and had contained a covenant binding Costello, his heirs and assigns, to pay the mortgage and to indemnify Meadows from it, I do not understand how that covenant could be enforced, not by Meadows or his estate, but by a stranger, for there is no privity of estate under which the plaintiff could claim the benefit of such a covenant.

The plaintiff, under the absolute covenant against incumbrances which he holds against Meadows, may be entitled to recover against him any actual loss he has sustained by reason of its breach, but Meadows may, from his omission to take any covenant from Costello, be without remedy over against him; but however that may be, I think it quite clear that the plaintiff has no remedy against the estate of Costello.

The cases cited might have some application if this were a question between the mortgagees (assuming the deed to Costello to have been so framed as to shew an agreement on his part to pay the mortgage) and his estate, on the

ground that the mortgage money was the consideration for the purchase, and might thus possibly be treated as money left in the hands of the purchaser for the use of the incumbrancer, but there is no privity between this plaintiff and Costello.

I am of opinion that the judgment is correct, and that this appeal should be dismissed, with costs.

PATTERSON, J. A.—The questions in this case coming before us upon the demurrer of Costello's executors to the plaintiff's bill of complaint, we must of course take our facts from the statements in the bill alone.

The plaintiff there tells us that Meadows being owner of two parcels of land, which I may call parcel 12 and parcel 13, had made two mortgages, each covering both parcels, to the same mortgagees, one for \$1,600, the other for \$500. He sold and conveyed parcel 13 to Costello for \$1,600, subject to the \$1,600 mortgage, and absolutely covenanted for title save as to the \$1,600 mortgage and the interest on it. The intention and agreement of Costello and Meadows was, that Costello should pay the \$1,600 mortgage and indemnify Meadows against the payment of it. That was the real consideration for the sale, but it was not so expressed in the deed, and Costello did not expressly covenant by the deed to pay the mortgage or to indemnify Meadows.

This is all the information we have respecting the transaction between Meadows and Costello. It shews that, as between them, the \$500 mortgage was to be thrown entirely on parcel 12, which Meadows retained, and that Meadows was personally bound to protect lot 13 from that mortgage; that the \$1,600 mortgage was to be thrown entirely on parcel 13, Costello being bound, not only to protect parcel 12 from it, but being personally bound to pay it off. That was the agreed mode in which he was to pay the consideration money for his purchase, and an action at law would have lain against him for failing to pay it. An obstacle in the way of suing at law for the purchase

money of land, after conveyance executed, has sometimes been interposed by the receipt ordinarily contained in the conveyance; but, setting aside the consideration of the power of our Courts of law under the C. L. P. Act, to prevent inequitable defences, we are not told that in this case any such obstacle existed. I take it that on the facts before us Meadows had a right of action against Costello personally at law as well as in equity.

Then Meadows sold and conveyed parcel 12 to the plaintiff, who was to pay, as part of his purchase money, the \$500 mortgage.

Costello devised parcel 13 to his wife and she sold it to Matchett, who covenanted with her to pay off the \$1,600 mortgage.

The instalments and interest on the \$1,600 mortgage were allowed to fall in arrear. The bill does not state whether or to what extent the \$500 mortgage was also in arrear; but it goes on to allege that the mortgagees proceeded, under the powers of sale in the mortgages, to sell both parcels for the said arrears. The plaintiff bought both parcels at the sale for \$15 an acre, and paid the purchase money, thereby satisfying both mortgages; and he took a conveyance of the lands from the mortgagees.

The claim for relief is put, in the bill, upon the ground that Meadows is liable directly, and the other defendants through Meadows, to pay the \$1,600 mortgage and to save the plaintiff harmless from it.

I agree that no satisfactory reason has been shewn for disturbing the decision of the Court below.

The substance of what the plaintiff did was to pay off both mortgages after the sale, as he might have done before the expense of the sale had been incurred. The price he paid was \$2,250, which has the appearance of being arrived at by a computation of what was due on the mortgages, although of course we cannot say that it was not the highest price that could have been obtained for the land.

If the plaintiff had taken an assignment of the \$1,600 mortgage, and had thus assumed the position of mortgagee,

there might perhaps have been room for the contention that Costello's agreement with Meadows to pay the mortgage might be made available by him. It is not necessary to inquire closely whether or not that contention must have succeeded ; but that it would not have been unsupported by authority is manifest from the cases commented on by Proudfoot, V. C., in *Parker v. Glover*, 24 Gr. 537, and others which may be found discussed with care and ability by Mr. Marsh, in the *Canadian Law Times*, Vol. 2 pp. 49 *et seq.* and 109 *et seq.*

But the plaintiff did not take an assignment, apparently preferring to acquire an absolute title to the land by means of the sale.

It has been suggested in argument that the plaintiff might have pursued his remedy in the name of Meadows, and therefore, to avoid circuity, may proceed directly in his own name.

At first sight this suggestion is not devoid of plausibility, but I do not think it will bear examination.

That no action could be maintained by the plaintiff in the name of Meadows which Meadows could not himself bring is a truism.

What action could Meadows maintain ? If he sued upon the promise to pay off the mortgage, the answer would be, that the mortgage is paid.

The undertaking to indemnify him would not sustain an action, because he has not been damnified.

We do not see in what particular the plaintiff has been injured, because the land may be worth all and more than all it has cost him. But taking it to be admitted by this demurrer that he has suffered some prejudice, he has, of course, his action against Meadows on his covenant ; and Meadows, if made liable, will have a right to be indemnified by Costello's estate. In the meantime, however, he has not suffered.

If Meadows could, *quia timet*, file a bill against Costello's representatives, or even in the stronger case of his having already suffered damage, could the plaintiff insist upon his

taking action for the plaintiff's benefit, or permitting the plaintiff to use his name for the purpose ?

I apprehend this could only be affirmed on the principle which entitles a creditor to the benefit of a security given by the principal debtor to his surety. The security in this case is the obligation of Costello ; but it is held by the principal debtor (*quoad* the plaintiff) and not by the surety. To give the doctrine any foothold we must first find that by reason of what had taken place between Meadows and Costello, they had become, as between themselves, Costello principal obligor, and Meadows his surety ; and further, that those relationships had been established between them and the plaintiff. In effect, the plaintiff would require to maintain that Meadows was trustee for him of the benefit to be derived from Costello's promise. Now, whatever may be the force of such a position when taken by a mortgagee seeking to enforce payment of his debt against one who has promised the mortgagor to pay it, I am not aware of any authority for saying that the plaintiff, who is an entire stranger to the dealings between Meadows and Costello, can assert any such right.

The point decided in *Campbell v. Robinson*, 27 Gr. 634, and for which it was cited, does not arise here. We have not to consider whether, if Costello's executors had submitted to remain before the Court, Meadows could have asked, by way of relief against his co-defendants, that they, being liable over to him, should be ordered to account directly to the plaintiff ; because they object *in limine* to the plaintiff's right to bring them before the Court. In *Campbell v. Robinson* all the defendants were proper parties to the bill.

I agree that we must dismiss the appeal, with costs.

MORRISON, J. A., was absent from illness when judgment was delivered.

REGINA V. HODGE.

REGINA V. FRAWLEY.

B. N. A. Act, construction of—Provincial Legislatures, power of, to imprison with hard labour—Delegation of the powers of Legislature to License Commissioners under the B. N. A. Act—Tavern licenses—Billiard tables.

The Legislatures of the Provinces having been assigned the sole power of passing laws for the infliction of penalties and imprisonment for the due enforcement of a law of the Province in relation to a matter with which it alone has power to deal; and the granting of licenses for the keeping of public houses and billiard tables for hire, being subjects over which the Provincial Legislature has exclusive jurisdiction.

Held, (1) that the enactment of the statute, (R. S. O. ch. 181,) restricting the hours within which billiard rooms in inns should be kept open, was not *ultra vires*; and (2) [in this reversing the judgment of the Court below,] that the Provincial Parliament had power to delegate to the License Commissioners certain powers in order to the carrying out its legislation upon particular subjects.

The power of the Provincial Legislatures to pass laws for the purpose of compelling obedience to those enactments respecting subjects which, by the B. N. A. Act, are assigned specially to those bodies, is inherent in them aside from the 92nd section of the Act.

The word "imprisonment" used in that section does not necessarily exclude the imposition of hard labour as part of the punishment. Therefore:

Held, [reversing the judgment of the Court below,] that the Legislature of this Province has power to impose hard labour in addition to imprisonment.

By clause 8 of the 92nd section of the B. N. A. Act, exclusive power is given to the Provincial Legislatures to make laws in relation to "Municipal Institutions in the Province," and clause 9 gives similar power in relation to "Shop, Saloon, Tavern, Auctioneer, and other licenses in order to the raising of a revenue for Provincial, Local, or Municipal purposes."

Per SPRAGGE, C. J., that clause 9 is cumulative to clause 8, and was intended to authorize provincial legislation in relation to licenses, for the purpose of raising a revenue as well as for the regulation of matters of police.

THE first of the above cases was an appeal from the judgment of the Court of Queen's Bench quashing the conviction, by George Taylor Denison, Esquire, the Police Magistrate of the city of Toronto, of the defendant, on the 19th of May, 1881,—

"On the information and complaint of * * Thomas Dexter, whereby the said Archibald G. Hodge was convicted, for that he, the said Archibald G. Hodge, did unlawfully permit and suffer a billiard table to be used, and a game of billiards to be played thereon, in his tavern in the

said conviction named and described, during the time prohibited by the Liquor License Act for the sale of liquor therein, to wit, after the hour of seven o'clock at night, on the 7th day of May, being a Saturday, against the form of the resolution of the License Commissioners for the city of Toronto for regulating taverns and shops, passed on the 25th day of April, 1881, in such case made and provided."

In the secondly named case the defendant Thomas Frawley had been convicted by Thomas McCrae, Esquire, Police Magistrate in and for the town of Chatham—

"For that he the said Thomas Frawley, on the 28th day of December, 1880, at the town of Chatham, * * unlawfully did keep manufactured liquors at his house in the said town of Chatham, for the purpose of selling, bartering, or trading therein, without the license therefor by law required; and it appearing to me that the said Thomas Frawley was previously, to wit, on the 4th day of April, A.D. 1877, at the said town of Chatham, before me Thomas McCrae, Police Magistrate in and for the town of Chatham, in the said county, duly convicted of having, on or about the 27th day of March, A.D. 1877, at a house of entertainment kept by him the said Thomas Frawley, in the said town of Chatham, unlawfully kept spirituous liquors for the purpose of selling, bartering, or trading therein, without the license therefor by law required, I adjudge the offence of said Thomas Frawley, hereinbefore firstly mentioned, to be his second offence against the "Liquor License Act" (Israel Evans being the informant), and I adjudge the said Thomas Frawley, for his second offence, to be imprisoned in the common gaol of the county of Kent, at Chatham, in the said county of Kent, there to be kept at hard labour for the space of three calendar months."

The defendant thereupon moved before the Judge of the County Court of the county of Kent, to quash such conviction, which was refused, and the conviction affirmed, with costs.

The defendant in each case thereupon obtained a writ of *certiorari*, to return the several papers and proceedings to the Court of Queen's Bench, and in Easter Term 44 Vic., (on the 25th of June, 1881), that Court ordered the conviction in each case to be quashed. See 46 U. C. R. 141 and 153, where the facts and documents are fully set forth.

The Crown thereupon appealed to this Court, and the two cases came on for argument on the 13th of February, 1882.*

*Present.—SPRAGGE, C. J., BURTON, PATTERSON, and MORRISON, JJ.A.

Attorney-General Mowat, and Bethune, Q. C., for the appeal in the first case.

J. K. Kerr, Q. C., and S. H. Blake, Q. C., contra.

Attorney-General Mowat, Robinson, Q. C., and Hodgins, Q. C., for the appeal in the second case.

McMichael, Q. C., contra.

In the first case it was insisted on behalf of the appellant, that the Provincial Legislatures had the fullest legislative authority over the class of subjects in question, and could constitutionally make laws empowering Boards of License Commissioners, or other municipal or local bodies to make local regulations; that is in effect, pass by-laws or resolutions with penalties in respect to such matters as such boards or local bodies were empowered to deal with; and such laws were not an illegal delegation of legislative powers, but a rightful exercise of the authority possessed by Provincial Legislatures constituted under Imperial statutes.

In opposing the appeal the respondent contended that the Legislature of Ontario had not authority to enact such resolutions as had been passed by the Board of License Commissioners, and under which the conviction complained of had been obtained; or to create offences and annex penalties for the infraction of the by-laws or resolutions as had been attempted by the License Commissioners; but even if the Legislature of the Province had authority to enact such resolutions or regulations in respect to inn-keepers, clearly Parliament had not the power of delegating such legislative authority to a Board of Commissioners, nor indeed to any other body outside of the Legislature. Under these circumstances the resolutions were illegal and unauthorized, and being so, the conviction founded upon them must be illegal and invalid.

In the second case—that against Frawley—it was contended for the appellant that the Act in question was *intra vires* of the Provincial Legislature of Ontario, and the Provincial Legislatures had power to enforce their laws by

imposing hard labour: that the power of imposing hard labour did not depend on the 15th Article of the 92nd section of the B. N. A. Act; it being contained and included, also, as well in the power of Provincial Legislatures to deal with all civil rights, as in the implied and incidental power of selecting and adopting, at their own discretion, and according to their own judgment, whatever means they from time to time think best for enforcing laws on every subject within Provincial jurisdiction: that the 15th article was not intended to restrict Provincial Legislatures to imprisoning in idleness; it does not limit the imprisonment in regard to either time or the employment of the prisoners; as it does not restrict in any way the fines and penalties to be imposed. The use of the word "imprisonment," and of like words, to imply and include hard labour where hard labour is not expressed, is not without example in British and Canadian statutes. That this was the meaning intended by the 15th article appears from the considerations above mentioned; and also from the history, objects, and uses of requiring labour from prisoners; the course of British and Provincial legislation on the subject prior to the passing of the B. N. A. Act; the state of such legislation at the time of the passing of that Act; the powers which even municipal councils and other local bodies in Canada then and long before possessed to impose hard labour on offenders against their by-laws; the special character of the B. N. A. Act as a Constitution; and the nature and extent of the legislative powers assigned thereby to the Provinces; and of the legislative powers which the Provinces possessed on the same subjects up to and at the time of Confederation.

On behalf of Frawley it was insisted that the Provincial Act, under which the defendant had been convicted, in so far as it imposed hard labour, was *ultra vires* of the Provincial Legislature of Ontario: that the Province succeeded to no power and could possess none except such as was expressly conferred by the Confederation Act, which reserved the right to the Dominion Legislature to make

laws respecting all matters not expressly designated as within the powers of the Provincial Legislature; that section 92, clause 15, B. N. A. Act, expressly limits the quality but not the degree of punishment for infringing laws within the powers of the Provincial Legislature; and that "hard labour" was not within the contemplation of the clause; and that even if it were within the nature of the punishment, it could not be enforced for an infraction of the Liquor License Act, which is *ultra vires* of the Provincial Legislature, being an Act which deals with trade and commerce.

Counsel also contended that the powers of the several Provinces prior to Confederation had not been transferred to and vested in the separate Provinces which compose the Dominion; and that if the Local Legislature had incidental power to enforce its enactments, there could not possibly be any need of specifying the punishment, as "fine," &c.; and further, if the means for enforcement were within the discretion of the separate Provinces, they might, in cases where hard labour was not effective, direct corporal punishment.

In addition to the authorities referred to in the Court below, counsel referred to and commented on Imperial Acts 15 Geo. II., ch. 24; 4 Geo. IV., ch. 19, sec. 2; ch. 64, sec. 10; 5 Geo. IV., ch. 83, sec. 11; 6 & 7 Vict., ch. 96, sec. 4; 28 & 29 Vict., ch. 126, sec. 4: C. S. U. C., ch. 76, sec. 11, *et seq.*; C. S. U. C., ch. 73, sec. 97; ch. 107; Can. Stats. 20 Vict., ch. 28, secs. 1, 5, 8; Dom. Stat. 36 Vic., ch. 69, sec. 2; 38 Vict., ch. 46; 44 Vict., 32, secs. 4, 6; R. S. O. ch. 218; *Regina v. Burah*, L. R. 3 App. Ca. 889; *Regina v. Lougee*, 10 U. C. L. J. 135; *Kirkpatrick v. Askeu*, Rob. & Jos. Dig. 1992; *Adley v. Reeves*, 2 M. & Selw. 61; *McCulloch v. State of Maryland*, 4 Wheat. 311, 421; *Wilberforce* on Statute Law, p. 50; *Bump's* Notes of Constitutional Decisions, pp. 95 to 100, 318 to 320, 336 to 338, and cases cited; *Cooley* on Constitutional Limitations, 3rd ed., pp. 63, 64, and cases cited; *Dillon* on Corporations, sec. 270, (3rd ed., sec. 336.)

June 30, 1882. SPRAGGE, C. J.—In the first named case the only question is upon the conviction of the defendant, who was licensed as a tavern-keeper in the city of Toronto, for allowing a billiard table to be used in his tavern after the hour of seven o'clock at night on Saturday, the 7th of May, 1881, in contravention of a resolution and enactment of the Board of License Commissioners of the city.

The selling of beer to a boy by the defendant is not in question.

The reasons of the defendant against the conviction are: 1st, that the Legislature of Ontario had not power to enact such regulations as were enacted by the Board of Commissioners, and to create offences and annex penalties for their infraction; and, 2nd, that if the Legislature had such power, it could not delegate such power to the Board of Commissioners.

It was upon this second ground that the judgment of the Court of Queen's Bench, now appealed from, is rested.

I do not propose to attempt a definition of the powers conferred by the Imperial Parliament, by the British North America Act, upon the Dominion Parliament and the Provincial Legislatures respectively. They each derive their powers from the same source; and the power to make laws in relation to the several classes of subjects, legislation upon which is, by the Imperial Act, committed exclusively to the Provincial Legislatures is as large and complete as it is in the classes of subjects committed by enumeration of subjects to the Dominion Parliament. The limits of the *subjects* of jurisdiction are prescribed; but within those limits the authority to legislate is not limited. I cannot do better than to quote here the language of Lord Selborne in *Regina v. Burah*, L. R. 3 App. Cases, 904. Speaking of the Council of the Governor General of India, upon which Legislative powers were conferred by the Imperial Parliament, he says: "The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it; and it can of course do nothing beyond the limits which circumscribe those powers. But when

acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament; but has, and was intended to have plenary powers of legislation, as large and of the same nature as those of Parliament itself."

Looking at the classes of subjects legislation upon which is committed exclusively to the Provinces, it is very apparent that it was intended that their Legislatures should possess very large and ample powers in relation to all subjects of a local and domestic nature. They had possessed plenary powers upon these subjects before Confederation; and the general scheme of Confederation appears to have been to leave to them the plenary control of these subjects. They were, under the Act, Legislatures in regard to these subjects in the true and full sense of the term. This is the more apparent from the use of the words "exclusive" and "exclusively," (and they are used repeatedly) in the Imperial Act. Other legislation upon these classes of subjects is excluded. No alteration, no amendment, no perfecting of any measure falling within these classes of subjects, can be made by any authority outside of the Provincial Legislature. It is therefore necessary that the Provincial Legislature should possess plenary power in relation to all these subjects, to change, amend, repeal, re-enact, and in short to deal with them as change of circumstances or other exigencies might render proper; the propriety of changes in any shape made, not to be challenged by any other legislative authority, and the power to make them being limited only by the rule, whether the law making the change is within the class of subjects legislation upon which is assigned to Provincial Legislatures.

The B. N. A. Act confers a constitution; distributively as to powers of legislation; and with those powers necessarily all that was needful to make those powers effectual. This is well put by Mr. Cooley, in his work on Constitutional Limitations, 4th ed., p. 77: "The implications from the provisions of a constitution are sometimes exceedingly important, and have large influence upon its

construction. In regard to the Constitution of the United States: [which it will be remembered has limited and enumerated powers—*Story's Constitution of United States*, sec. 426,] the rule has been laid down that where a general power is conferred, or duty enjoined, every particular power necessary for the exercise of the one or the performance of the other, is also conferred. * * Under every constitution implication must be resorted to, in order to carry out the general grants of power. A constitution cannot, from its very nature, enter into a minute specification of all the minor powers, naturally and obviously included in, and flowing from the great and important ones which are expressly granted. It is therefore established, as a general rule, that when a constitution gives a general power, or enjoins a duty, it also gives by implication every particular power necessary for the exercise of the one or the enjoyment of the other."

We have the high authority of Vattel upon the same point. He says, Book 2, ch. 17. secs. 285, 6: "The most important rule in cases of this nature is, that a constitution of Government does not and can not, from its nature, depend in any great degree upon verbal criticism, or upon the import of single words. Such criticism may not be wholly without use; it may sometimes illustrate or unfold the appropriate sense; but unless it stand well with the context and subject matters it must yield to the latter. While then we may well resort to the meaning of single words to assist our inquiries, we should never forget that it is an instrument of Government we are to construe; and as has been already stated, that must be the truest exposition which best harmonizes with its design, its objects, and its general structure."

One other consideration presents itself, which is, to my mind, conclusive. This matter of licensing and of the regulation of places and persons licensed pertains to municipal institutions, and is moreover of a local nature. Now, the making of laws in relation to both these subjects being committed exclusively to the Provincial Legislatures, and

legislation by any other power being thereby excluded, it follows that the B. N. A. Act operates to withdraw from legislative control *by any power or body whatever* the licensing and the regulation of places and persons licensed; powers in regard to which they had theretofore unquestionably exercised. The effect in that case would be more and other than a *distribution* of legislative power, it would be an *extinction* of legislative power in regard to subjects which, up to Confederation, had been subjects of Provincial legislation.

I will presently consider the question whether the imposing duties and conferring powers imposed by the Act of 1875-6 upon License Commissioners was a new delegation of authority not contemplated by the B. N. A. Act; but before doing so it will be well to consider this power to delegate, which is denied to the Provincial Legislature by the judgment of the Court of Queen's Bench. *Regina v. Burah*, is certainly no authority for the denial of such power. Lord Selborne gives his idea of the kind of power that cannot be delegated, when he says, at p. 905, that "the Governor-General in Council could not by any form of enactment create in India, and arm with general legislative authority, a new legislative power not created or authorized by the Councils' Act." But no part of his judgment countenances the idea that a legislative body may not delegate to others authority to make rules, orders, by-laws, or whatever may be necessary to carry into effect the enactments of the Legislature itself. Sir James Stephen, in his argument in the *Burah Case*, p. 896, gives several instances of what he calls conferred discretion, and delegation of authority. It would indeed be difficult to conceive any more decided instances of delegation of authority, and that *quasi* legislative authority, than is to be found in the last as well as previous Municipal Institutions' Acts passed by the Legislature of United Canada before Confederation; and it is to be remembered that that Legislature had no more power to delegate power upon that subject of legislation; than had the Legislature of Ontario after Confederation.

Besides the Municipal Institutions' Act, the Attorney-General in his argument gives us several instances of legislative delegation of authority by the Canadian Legislature before Confederation. One is the authority given to the Governor-in-Council by sections 9 and 10 of the Public Lands' Act, 23 Vict. ch. 2; another is the authority given by the Grammar Schools' Act, 22 Vict. ch. 63, to the Council of Public Instruction, to make rules and regulations for the organization and government of grammar schools; and there are besides the frequent instances of power delegated to the judiciary to make rules and orders of Court. I may instance the power delegated by 12 Vict. ch. 64, to the Court of Chancery. After enumerating a number of subjects in respect of which this power is given, this general power is delegated, "to make such general orders from time to time as the Court may deem expedient in relation to every other matter deemed expedient, for better attaining the ends of justice and advancing the remedies of suitors; with power from time to time to suspend, repeal, vary, or revive such orders;" and the only restriction upon the power so conferred was, that no such order should have the effect of altering the principles or rules of decision of the Court. We know also that the Imperial Parliament has, from time to time, delegated large powers of the like nature to the judiciary; and in the recent Judicature Acts, powers that are essentially legislative in their character.

My conclusion is, that it cannot be correctly laid down as a proposition of law that a Legislature cannot delegate its powers, to other bodies, or to boards of officers created by itself, in order to the carrying out its legislation upon particular subjects. It is not necessary to go further. It has been the course of legislation to do this in England, and in Canada; and also in the neighbouring republic, and it is manifest that a contrary doctrine would cripple legislation to a very serious extent.

It is important to bear in mind that the Imperial Parliament, in committing to the Provincial Legislatures the

making of laws in relation to municipal institutions, committed to them as a subject of legislation that which was as it then stood and had stood for a number of years, wholly a subject of delegated power from the general Legislature. The power was conferred in as broad and comprehensive terms as possible "to make laws in relation to." That necessarily imported *ex vi termini* power to change the laws in relation to that subject; and as long as the changes made were changes only in municipal institutions they were within the power. In the then Province of Upper Canada at the date of Confederation township councils, county councils, city councils, boards of police commissioners, were all parts of the machinery which, to take as an instance the county of York, constituted a municipal institution. Great changes might be made in all these pieces of machinery; their powers and duties might be changed; some parts might be left out, *e. g.* township councils, or county councils, or boards of commissioners, as making the machinery too cumbrous or too complicated, or for any other reason; and the powers and duties exercised by those left out might be committed to those remaining, or to some new boards or other pieces of machinery substituted for them. I cannot see how it could be *ultra vires* the Provincial Legislature to make all these changes provided they were changes only in relation to municipal institutions.

In the judgment of the Court below it is said: "Our Legislature has certainly delegated to the Board of License Commissioners the creation of certain new restrictions, and limitations on individual liberty of action; and moreover devolved on that Board the right to name the punishment for infraction, viz., fine and imprisonment.

* * It seems, in our judgment, very difficult to hold that the Confederation Act gives any such power of delegating authority, first of creating a *quasi* offence, and then of punishing it by fine and imprisonment." If, in the passage first quoted it is meant (as I think it must be meant) that the Provincial Legislature of Ontario has

delegated to the Board of License Commissioners the power of creating new restrictions and limitations on individual liberty of action, not possessed, *i. e.*, the power not possessed, by component parts or a component part of municipal institutions, I am unable to assent to the proposition. A short review of the legislation on the subject as it stood at the date of Confederation, and as it has been altered since, within the powers conferred by the Confederation Act, will shew this.

By the Municipal Institutions' Act of the late Province of Canada, passed in 1866, and which applied to Upper Canada only, different provisions are made as to the licensing of taverns and shops, and the licensing of billiard tables. Power to make by-laws for the licensing of taverns (licenses to shops not being in question, I will confine myself to the licensing of taverns and of billiard tables) was conferred upon the councils of townships, towns, and incorporated villages, and in cities upon the Commissioners of Police, and for regulating the houses or places licensed; and power to make by-laws for licensing, regulating, and governing all persons keeping billiard tables for hire or gain, in a house or place of public entertainment or resort, was conferred upon councils of townships, cities, towns, and incorporated villages. And these powers in relation to billiard tables have remained unchanged in the same bodies.

Under the same Act, 1866, Municipal Councils had power to pass by-laws for inflicting reasonable fines and penalties, not exceeding \$50, for breach of any of the by-laws of the corporation; and for reasonable punishment by imprisonment, with or without hard labour, for such breach in case of non-payment of fine and costs, and in the absence of means of distress.

So far, power was not given to police commissioners in cities to enforce the by-laws which they were authorized to make. They had the same power to make by-laws for the licensing and the regulation of taverns as the Municipal Councils had, but not the power to make by-laws for

enforcing their regulations; and the law stood thus until the Provincial Act of 1869, 32 Vict. ch. 32, was passed. This Act conferred upon commissioners of police in cities the same power of making by-laws to enforce their by-laws in relation to the licensing and regulation of taverns as was already possessed by the Municipal Councils. The Act did not confer upon the commissioners an unlimited right to name the punishment for infraction of their by-laws, but to attach penalties for their infraction in the same manner and to the extent that by-laws of city councils might be enforced under the municipal Act of 1866; thus placing the commissioners of police in cities upon the same footing in all respects as regards the licensing and regulation of taverns as the councils of municipal bodies other than cities, as was evidently intended by the Act of 1866.

The Act of 1874, which related only to tavern and shop licenses, made no difference in this respect. It re-enacted in substance the provisions of the Act of 1866 as to the licensing and regulating of tavern and shop licenses, &c.; it made it a matter of legislative enactment that in all places where intoxicating liquors may be sold no sale or other disposal thereof should take place between 7 p.m. on Saturday and 6 a.m. on the following Monday; adding penalties for the infraction of this provision.

The Act of 1875-6, by which the Board of License Commissioners was constituted, transferred to that body all powers and duties conferred and imposed upon the Commissioners of Police and Municipal Councils, respectively, by the Act of 1874; and that body, on the 25th of April, 1881, by what it calls a resolution, enacted that no licensee of a tavern should *inter alia*, allow a billiard table to be used therein during the time prohibited by the License Liquor Act—the Act of 1875-6—or by the resolution then passed; and it is for allowing billiards to be played in contravention of this resolution or enactment that the defendant has been convicted.

I do not myself entertain any doubt as to the power of

the Provincial Legislature to make the change made by the Act of 1875-6 in the municipal law as it then stood. I think it is to be regarded as only a change in the machinery by which the municipal institutions of the Province had theretofore been worked; and as the power to make laws *in relation* to municipal institutions was conferred upon that Legislature by the Confederation Act, it clearly, in my judgment, had the power to make that change.

If the change was *intra vires* the license commissioners had the same power to make by-laws in relation to the licensing of taverns, and in regard to "regulating" licensed taverns, as, under the Act of 1866 and the other Acts to which I have referred, was possessed by municipal councils and commissioners of police, respectively. I think it very clear, and I do not indeed understand it to be denied, that those bodies had power, under their authority to make by-laws for declaring the terms and conditions required to be complied with by licensees of taverns and for regulating licensed taverns, to prescribe hours during which the licensee should not permit billiards to be played in his tavern. There are a number of American cases upon the subject which are collected by Mr. Dillon in his work on Municipal Corporations, under the head: "Authority Delegated to Municipalities." I think it too clear to need the authority of decided cases. I will however refer to the judgment of Baron Martin in the *Attorney-General v. Radloff*, 10 Ex. 96; and to the judgment of our Court of Queen's Bench in *Regina v. Boardman*, 35 U. C. R. 300.

So far as to the delegation of power to create restrictions and limitations on individual liberty of action. The *quasi* offence created is the contravention of the regulations made by by-laws as to the hours during which games of billiards, bagatelle, and games of the like description may be played in taverns.

Then as to the delegation of power to boards of commissioners of police and the transference of that power to boards of license commissioners, to make by-laws for

attaching penalties to the infraction of their by-laws in relation to the licensing and the regulation of taverns. I have already observed that the power conferred was limited to that already possessed by municipal councils. Still it must be conceded that it was the delegation of a power to impose fines to a limited amount; and in case of non-payment, and the absence of distress, to imprison for a limited period, *i. e.*, not exceeding twenty-one days; and the question is, whether this falls within the power conferred of making laws in relation to municipal institutions and clause 15 of sec. 92 of the Confederation Act; and this appears to me the only point presenting any difficulty in the case.

Among the subjects in relation to which exclusive power to make laws is, by sec. 92 of the Confederation Act, committed to the Provincial Legislatures is this, numbered 15: "The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section." What the Provincial Legislature enacted by sec. 38 of the Act of 1869 was in substance this: that licensees of taverns in cities should be punishable for breach of by-laws made by commissioners of police, in the manner and to the extent that they were punishable for breach of by-laws in respect of the same subject matter made by municipal councils. The commissioners, it is true, were authorized to make by-laws "attaching penalties for the infraction thereof," but that power was expressly limited to the power conferred upon other bodies having the same powers in regard to licensing. Suppose section 38 had been silent as to by-laws attaching penalties, and had enacted only that licensees of taverns in cities should be subject to the same punishment for breach of by-laws made by commissioners as licensees in other municipalities are subject to for breach of by-laws made by councils, would such an enactment be *ultra vires*? It was a *law of the province* made in relation to municipal institutions, enacting that by-laws made by bodies which, at the date of confederation,

were component parts of municipal institutions, and with power to make those by-laws, should be enforced; and enacting how they shall be enforced, viz.: in the manner and to the extent in which by-laws of councils may be enforced. It would be only enacting, in another shape, that licensees of taverns infringing these by-laws should be punishable by fine, &c., describing the punishment as in the Act of 1866. I cannot think that such an enactment would be *ultra vires*. It would be within all the conditions of No. 15 of sec. 92. Is it then less a law of the province that is enforced by this enactment because, in addition to limiting the punishment, it requires that it shall be defined by by-law. That indeed is the real effect of the words used. The power of the police or other magistrate having cognizance of the offence would be larger in the infliction of punishment without the requirement that by-laws "to attach penalties" should be passed, for without such provision he would be limited only by the Act of 1866, while with that provision his power is limited both by the Act and the by-laws, as it is clear that the by-laws could not attach penalties beyond those authorized by the Act. The conviction then, in such a case, would be for breach of a by-law deriving its authority from the Act of 1866, amended, within the power of the Legislature, by the Act of 1875-6; and the conviction and punishment are, under the authority of the Act of 1869, for an offence against the provincial law of Ontario.

There is, moreover, this very important consideration, that if an infraction of tavern license by-laws made by Police Commissioners, and then subsequently by License Commissioners, cannot be made punishable by Provincial legislation, they cannot be made punishable at all, for they are not infractions of any law other than the law of the Province; and laws of the Province in relation to municipal institutions can only be enforced by the imposition of punishment under the authority of Provincial Legislation. My conclusion therefore upon both these points is, that the legislation of the Provincial Legislature was *intra vires*.

It is, however, matter of surprise and regret that the city officials concerned in the information laid against the defendant, and its prosecution, should have prosecuted as for an offence against the resolution of the license commissioners, instead of prosecuting for an offence against the by-law of the city itself, in relation to the licensing and regulation of billiard tables. By the Municipal Institutions' Act of 1866, power was conferred upon the municipal Councils of *cities* as well as other municipalities, to make by-laws for licensing, regulating, and governing all persons who, for hire or gain, keep billiard tables, or have a billiard table in a house or place of public entertainment or resort; and for fixing the sum to be paid for such license. This power was renewed in the same terms in the Municipal Institutions' Act of Ontario in 1873, and again in the R. S. O. ch. 174.

Under the authority thus conferred, the municipal council of the city of Toronto passed by-law No. 477, printed in the Appeal Book, at pp. 6, 7, fixing the sums to be paid for licenses; and making regulations in regard to the licensees and the use of their tables; among others this, that every licensed billiard-room situate in any place of public entertainment or resort, shall be closed from and after the hour of seven on Saturday night, till the hour of six on Monday morning thereafter. And the conviction and the evidence upon which it was founded, both shew that every fact necessary to shew the defendant an offender against the by-law was proved; and the penalty adjudged against the defendant was within the penalty authorized by the same statute for breach of by-laws of corporations.

If this plain and obvious course had been pursued, the only question that could have arisen would have been, whether the provisions of the Municipal Institutions' Act, in force in Upper Canada at the date of Confederation have been abrogated, a question upon which I think no reasonable doubt can be entertained.

We are informed that this is a test case. If by this it is meant as a test whether the licensee of a tavern or other

place of public entertainment within the description contained in the Act of 1866, and being also the licensee of a billiard table within the description contained in the same Act is or is not liable to conviction for the act for which this defendant was convicted, I am prepared to say that I see no reason whatever for doubting that he is liable to such conviction.

Whatever doubt may exist as to *this* conviction is due to the untoward ingenuity displayed by the city officials in complicating the real substantial question between the city and the licensees of billiard tables, by the course adopted by them in the charge and the prosecution of the offence.

In Regina v. Frawley :

SPRAGGE, C. J.—The conviction in this case is for the keeping by the defendant of manufactured liquors at his house in the town of Chatham, "for the purpose of bartering, selling, or trading therein, without license;" and, it appearing that the defendant had been previously convicted of the like offence, the defendant was adjudged for his second offence to be imprisoned at hard labour for three months.

The statute under which the defendant was convicted, warrants the conviction and the sentence. This is not disputed; but it is objected that it was *ultra vires* the Legislature of Ontario to pass the Act under which the defendant was convicted, it being, as is alleged, an Act which deals with trade and commerce; and further, that assuming the Act not to be objectionable on that ground, it is *ultra vires* in so far as it imposes hard labour with imprisonment, as the punishment for the offence committed.

In the Court appealed from the case was argued wholly on the point as to the power of the Legislature to impose hard labour, and in the argument on appeal the other point was so faintly touched upon by Dr. McMichael that I took him to be rather suggesting whether the provision, for

breach of which defendant was convicted, might not be *ultra vires*, than contending that it was so. I think it quite clearly a matter *intra vires* the Provincial Legislature.

It is, I think, clearly so as a matter of police regulation; and being so, falls within one of the enumerated classes, viz., "municipal institutions."

With regard to the point made in argument that clause 9 authorizes legislation in relation to shop, saloon, tavern, auctioneer, and other licenses, only in order to the raising of a revenue, I observe that in several of the reported cases it has been assumed that the power to legislate in regard to licenses is limited by the purpose indicated in clause 9. It does not appear to me that that was the purpose of clause 9. The power of licensing shops, saloons, taverns, and auctioneers, and granting some other licenses, existed in municipal bodies at the date of Confederation, and that power passed to the Provincial Legislatures under clause 8. If clause 9 is to be read as it is assumed that it should be read, it abridges the power conferred by clause 8, and would limit the power to legislate in relation to these licenses to cases in which they were necessary in order to the raising of revenue, however necessary such legislation might be, in the case of houses of public entertainment, to the prevention of intemperance and the preservation of order.

My interpretation of clause 9 is that it is cumulative to clause 8, and that it was intended to authorize Provincial Legislation (or at least to settle any doubts that might exist upon the point), in relation to the licenses enumerated, for the purpose of raising revenue, as well as for the regulation of matters of police. I have hesitated in placing this construction upon clause 9, because so far as I am aware the more limited construction placed upon it in the earlier cases after Confederation has been generally accepted as the correct interpretation of the clause; but I am unable myself to concur in that construction.

The point upon the question argued in the Court below

is put thus by the learned Chief Justice: "It seems to us that the decision in this case must turn on the simple point—does a power to punish by imprisonment carry with it the power to inflict hard labour in addition to the power to restrain personal liberty."

It may be conceded that an act creating an offence and annexing imprisonment simply, as the penal consequence of the committing of the offence, would not warrant a sentence of imprisonment with hard labour; but the question is a very different one when we find the word in an Imperial Charter conferring a constitution. When the word is found in an Act creating an offence, the rule invoked by the learned Chief Justice no doubt applies, viz., that "words conferring authority to punish in any specified manner must be construed with reasonable strictness." And so, a Judge trying a party for an offence has not authority to award a punishment beyond that which, he finds in the Act, or by a plain rule of criminal law annexed to the offence. The position of a Legislature is widely different; and the language of Vattel, which I have quoted in the case against Hodge, is apposite: "while we may well resort to the meaning of single words to assist our inquiries, we should never forget that it is an instrument of Government we are to construe, and * * that must be the truest exposition which best harmonizes with its design, its objects and its general structure."

The Confederation Act gives power to Provincial Legislatures to make laws in relation to a number of classes of subjects. The necessity of conferring power to enforce these laws was foreseen. The Act does not say that persons convicted of offences against these laws may be punished by fine, penalty or imprisonment; but it confers powers to make laws in relation to punishment in the same terms as are used in relation to other legislative power conferred, or, in the words of the Act, the power of imposition of punishment by fine, penalty, or imprisonment, is one of the "classes of subjects" in relation to which exclusive power of legislation is conferred; and it is conferred in order to

the enforcing any law of the Province in relation to the enumerated classes of subjects.

It must be conceded that the power thus expressly conferred is to be limited to punishment by fine, penalty, or imprisonment. Still, in interpreting the words used, the rule as to construing the Act with strictness, or even with reasonable strictness, does not apply. It does not, in my judgment, apply, because it is used in conferring power upon a Legislature, not in simply annexing to a crime its penal consequences; in which latter case the rule of strictness has always been the rule of construction; while in the case of what Vattel calls an Instrument of Government, which the Confederation Act certainly is, no such rule prevails.

The word imprisonment does not *ex vi termini* exclude the imposition of hard labour; for we find in the Municipal Act in force at the date of Confederation the term imprisonment with or without hard labour, and in Acts in force at the same date we find it declared that a sentence of imprisonment in the Penitentiary shall include hard labour whether expressed or not; and what is nearer to the case before us, by sec. 110 of ch. 99 of the Consolidated Statutes of Canada, we find it enacted that "when a person has been convicted of an offence in which imprisonment other than in the Penitentiary may be awarded, the Court may sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour in the Common Gaol or House of Correction;" and it enables the Court to sentence him also to solitary confinement. The provision in the Municipal Institutions' Act of 1866, respecting work houses and houses of correction, (section 417,) authorizing commitments with or without hard labour; and the Co-operative Associations' Act of the previous year authorizing the same punishment, may also be referred to.

The Imperial Parliament in framing the Confederation Act must be taken to have known what was the law in the Provinces in relation to the classes of subjects enumerated in sections 91 and 92; to have known therefore *inter alia*,

the provisions of the Municipal Institutions' Act of 1866. Parliament therefore knew that in order to the enforcing of By-laws of Municipal Corporations, imprisonment with hard labour was one of the means authorized by the law of Upper Canada. But, it is said that imprisonment, with hard labour as a direct punishment, could not be awarded for selling liquor without license: that is so, but imprisonment with hard labour could be awarded in the event of non-payment of fines, and in the absence of distress. It was then awarded in order to the enforcing of the law, the very purpose for which imprisonment is authorized by section 92, "the imposition of punishment by fine, penalty, or imprisonment for enforcing any law," &c. It would be abridging the power already possessed by the Provincial Legislatures to deny to them the power exercised in this case, for imprisonment, whether it be adjudged directly for breach of the law or because the culprit has not paid the fine inflicted, and there being no means of levying it, is as put in section 92, a punishment in order to the enforcing of the law. Parliament found Provincial Legislatures possessed of the power of enforcing the laws of their Provinces in regard to matters of police regulation (as well as in regard to the criminal law outside of matters of police) by imprisonment, with or without hard labour. The Provinces surrendered *inter alia* their power of legislation in relation to "The Criminal Law." They received *inter alia* express power to enforce the laws of the Provinces by fine, penalty, or imprisonment; to make laws in relation to so enforcing them. The Act, as has been often said, was the fruit of a compact. Is it reasonable to read the Act as if intended to fetter the Provincial Legislatures in their discretion as to the kind of imprisonment which they should judge to be reasonable and proper for an infraction of their laws, even to abridge the power in matters of police regulation—matters peculiarly within their Province—which they already possessed? The amount of fines, the kind of penalty, the duration and place of imprisonment, are all left wholly to the Provincial Legislatures; but if this

clause of the Act has been correctly interpreted, the Legislatures were powerless to say how those sentenced to imprisonment should be employed: the effect would be, that they were to be within the walls or yards of a prison, but unemployed—idle.

It is safe to say that the word "imprisonment" could not have been received in that sense by the parties chiefly interested in the compact—the Provinces; and we are assisted in the meaning which the Imperial Parliament would attach to the word by the course of Imperial legislation for many years back. Mr. Hodgins, in a paper put in with the appeal books, has furnished us with numerous instances of punishment by imprisonment with hard labour under English law. As long ago as the time of James I., Houses of Correction were established, and those imprisoned in them had to support themselves by their own work. By an Act of George II. persons committed by justices to houses of correction were to be set to hard labour. Under a very old Act, 3 Car. I, ch. 3, persons keeping ale houses without license were made liable to be committed for a second offence to the House of Correction, and consequently to be put to hard labour. By 9 George II. persons selling spirituous liquors under certain circumstances were made liable to commitment to the House of Correction with hard labour; and several other instances are given of the like punishment for the like offences.

A good deal that was said in the case of *McCulloch v. The State of Maryland*, 4 Wheaton 316, by that very learned and able jurist, Chief Justice Marshall, is apposite to the case before us. There were two leading questions in the case. The first, and the one material as bearing upon this case, was, whether it was in the power of Congress to establish a national bank, the Constitution, in the powers enumerated not giving authority to do so. The learned Chief Justice, almost in the words of Vattel, says, "In considering this question, then, we must never forget that it is a Constitution we are expounding."

There is much more in the judgment of the learned Chief Justice that is apposite to the question of the interpretation of the words used in clause 15 of section 92, but as it is apposite not only to that question, but to another point made by the learned Attorney-General, I will reserve the citation of them to the discussion of that point. The point, shortly, is, that the Provincial Legislatures had, as incident to their constitution, the power of enforcing the laws made by them in relation to any matter coming within any of the classes of subjects assigned to their jurisdiction, and to make laws for that purpose; and did not need the express power given by clause 15. There is much force in this. I think it is sound in principle, and that the office of clause 15 is to give express sanction to it; and at the same time to prescribe; but to prescribe in general and comprehensive terms, the nature of the punishment by which those laws might be enforced.

The learned Chief Justice Marshall puts thus pithily the powers of sovereignty as divided between the Government of the Union and the Governments of the States: "They are each sovereign with respect to the objects committed to it; and neither sovereign, with respect to the objects committed to the other." After enumerating some of the great powers committed to the Government of the Union (among which, however, as he says, we do not find the word "bank" or "incorporation,") he proceeds: "It may, with great reason, be contended that a Government entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends must also be entrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means.

The powers assigned by the Confederation Act to the Provincial Legislature are large and various; and it is not too much to say that it is a reasonable contention that

Legislatures entrusted with such powers, on the due execution of which the happiness and prosperity of the Provinces so largely depend, must also be entrusted with ample means for their execution. The learned Chief Justice had to meet this difficulty, that the Constitution of the United States does not confer upon Congress power, as the Confederation Act confers upon the Provinces power, to make laws in relation to the enumerated classes of subjects; but only such powers as may be "necessary and proper" for carrying them into execution. After commenting upon and interpreting the language used, the Chief Justice proceeds: "So, with respect to the whole penal code of the United States, whence arises the power to punish in cases not prescribed by the Constitution? All admit that the Government may legitimately punish any violation of its laws; and yet this is not among the enumerated powers of Congress. * * The good sense of the public has pronounced without hesitation that the power of punishment appertains to sovereignty, and may be exercised whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers, and may be used, although not indispensably necessary. It is a right incidental to the power, and conducive to its beneficial exercise" I will conclude my citations from the judgment of the learned Chief Justice with this apposite quotation: "We admit, as all must admit, that the powers of the Government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the National Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate; let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

I make no apology for quoting so largely from the judgment of Chief Justice Marshall. It enunciates clearly and forcibly, constitutional doctrines which, from the nature of the Constitution of the United States, have been necessarily presented to the consideration of the Judges of that country more than has been the case in England, and which, since Confederation, have an important bearing upon the powers of the Dominion and Provincial Legislatures.

I may be allowed to add that it appears to me that these implied powers, or powers incident to the principal power conferred, have their root in the rule often enunciated, that where power is conferred to do an act or several acts, the power conferred in terms carries with it by implication all the powers that are necessary to the due and effectual execution of the principal power conferred.

In my judgment, however, it is not necessary to resort to the doctrine of implied power, for I think that the language of clause 15, giving power to make laws for enforcing Provincial law by, *inter alia*, "imprisonment," found where it is in a charter of Government, and looking at the law as it then stood, and to the statutes and the circumstances to which I have adverted, must be interpreted as conferring power to enforce Provincial laws by imprisonment with hard labour. Without adopting as my own all the language of Mr. Pomeroy in his book on Constitutional Law, p. 16, I think with him that an instrument conferring a Constitution should not by interpretation lose its character as the fundamental organic law of a Government, and be brought to the level of an ordinary private statute, to be expounded with the technical and literal precision which would be appropriate to a penal code.

I feel that I have not by any means exhausted the subject. I have left some points untouched, but the considerations to which I have directed my attention, and which I have endeavoured to explain, lead me to the conclusion that the Legislature of Ontario had the power

which it exercised, and which has been adjudged in the Court appealed from to be *ultra vires*.

In the Queen v. Hodge :

BURTON, J. A.—The questions raised upon this appeal are of great general importance, involving as they do the power of the Provincial Legislature to pass enactments for enforcing their own laws by fine or imprisonment, or, assuming them to have the power, their authority to delegate it within certain limits to a Municipal Council or other local board.

The duty of deciding upon the validity or invalidity of an Act of the Dominion Parliament or Local Legislature by reason of their transcending the limits of their legislative power, is one which the Courts of this country were seldom called upon to consider before the passing of the B. N. A. Act, but questions of the kind have for many years been the subject of discussion and decision in the Courts of the United States, and we can scarcely do better than adopt the sound rule established in those Courts, when placing a judicial construction on constitutional provisions, which declares, that in case of doubt every possible presumption and intendment will be made in favour of the constitutionality of the Act in question, and that the Courts will only interfere in cases of clear and unquestionable violation of the fundamental law.

It must also not be lost sight of that the powers intended to be conferred upon the several Legislatures of the Dominion and the Provinces were necessarily expressed in very general terms, it being foreseen by the framers of the measure that it would be a perilous and difficult, if not impracticable task, to provide for minute specifications of their respective powers, or to declare the means by which they should be carried into execution.

The leading features of the scheme of Confederation were that the Provinces should have full and exclusive control over their internal affairs, and the power to make

laws for the general order and good government of the Provinces, whilst the like power to make laws for the peace, order, and good government of the entire Dominion, in relation to all matters not coming within the classes of subjects assigned exclusively to the Legislatures of the Provinces, was given to the Dominion Legislature.

The powers so granted to the Provincial Legislatures are in some respects fully as important as those given to the Dominion, as for instance the exclusive power to deal with property and civil rights, the administration of justice, and the constitution of the Courts, whilst those granted to the Dominion are more national in their character, or, to cite the language of the Colonial Secretary in introducing the bill, "The object in view was to give to the central government those high functions and almost sovereign powers by which general principles and uniformity of legislation might be secured in those questions that were of common import to all the Provinces, and at the same time retain for each Province so ample a measure of municipal liberty and self-government as would allow them to exercise those local powers which they could exercise with advantage to the community."

But as to each the Imperial Act was intended to define as accurately as could be done in a constitutional charter, their relative powers; all matters of a local and private nature, including those specially enumerated in section 92, being given to the Provincial Legislatures, and the remainder of the legislative powers necessary for the peace, order, and good government of the Dominion, including those specially mentioned in section 91, being considered as general powers, and entrusted to the Dominion Parliament.

The case of *Dobie v. The Temporalities Board*, L. R. 7 P. C. 136, recently decided in the Privy Council, is an illustration of this distinction. The Act there in question, passed by the Legislature of Quebec, professed to deal with a single statutory trust, and interfered directly with the constitution and privileges of a corporation created by an Act of the late Province of Canada, and having its

corporate existence and corporate rights in the Province of Ontario as well as in the Province of Quebec.

It clearly did not fall within any of the classes of subjects enumerated in section 92, it was not a matter of a local or private nature, and could therefore only be dealt with by the Dominion Parliament.

Within its range then each has an exclusive power; the only case in which a concurrent power is given is in section 95, to make laws in relation to agriculture and immigration, and there it is specially provided that the Provincial legislation may be overridden by the Dominion Parliament.

But there are cases in which the power is given generally to the Provinces to deal with a particular subject. Take for instance property and civil rights, which in those general terms would comprise the power to regulate contracts of every kind, including bills of exchange and promissory notes. When therefore we find the Dominion entrusted with the exclusive power to legislate upon bills and notes, the only way to make the Act consistent is to read this as an exception to the general power granted to the Province. So again, although the Provinces have exclusive power under subsection 14 to make laws in relation to the administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and criminal jurisdiction, when we find bankruptcy and insolvency mentioned as a subject for the exclusive legislation of the Dominion we must necessarily understand that the organization of an Insolvent Court, and administration of justice and proceedings connected with insolvency, are excepted from the general words of that sub-section.

But to that extent only can the Dominion Parliament assume to interfere. Reading the powers granted in section 92, with the exceptions where they occur in section 91, the Local Legislature is absolute and supreme over those subject matters with as ample power to legislate in respect of them as the Imperial Parliament, and without any possibility of interference by the Dominion Legislature.

Adopting the same rule of construction, sub-section 15 of section 92, must, in my opinion, be read as an exception or modification of sub-section 27 of section 91, which vests in the Dominion Parliament the power to deal generally with the criminal law.

The powers claimed to be exercised by the Provincial Legislature in the present case must depend upon the construction to be placed on sub-sections 8, 13 and 16, of section 92, for I agree with the learned Chief Justice that a right to license an employment does not imply a right to charge a license fee therefor, with a view to revenue, unless such seems to be the manifest purpose of the power. The right to restrict parties by requiring a license must be sought for under the sections I have referred to, and not under sub-section 9, which was passed not for the purpose of conferring the power to issue licenses, but to enable the Provinces by that means to raise a revenue for provincial, local, or municipal purposes. The only power of taxation given by sub-section 2, is that of direct taxation. Sub-section 9 was intended to allow them in this particular mode to raise a revenue by indirect taxation.

The other sections vest in them the power to make laws in relation to municipal institutions, property, and civil rights, the imposition of punishment in the manner specified for enforcing any law of the Province made in reference to any of the classes of subjects under section 92, and the general power as to all matters of a merely local or private nature in the Province.

At the time of Confederation, the Municipal Institutions' Act of 1866 was in force, and under it the municipal councils were empowered to pass by-laws and to fix the punishment within certain defined limits for their infraction. To the police commissioners had been transferred a power formerly vested in the council to pass by-laws regulating taverns, and to prohibit the sale of liquors without license, but no power was given at that time to the commissioners to enforce the performance of these by-laws by fine or otherwise, and by section 129 of the B. N. A. Act, this law

was continued in force until repealed or altered by the appropriate legislature.

It was at that time dealt with by the Parliament of the Province of Canada as coming within what were known as municipal institutions, the power of dealing with which is now within the exclusive jurisdiction of the Provinces; and it would certainly come within the general clause which confers exclusive power on the Provincial Legislature to deal with matters of a merely local or private nature, and does not fall within any of the subjects with which the Dominion Parliament has power to deal, unless, perhaps, by a general measure affecting the whole Dominion, which has not been done.

We accordingly find the Local Legislature dealing with it in 1869, and giving power to the commissioners to attach penalties for the infraction of their by-laws in the manner and to the extent that by-laws of the City Council might be enforced under the Municipal Act of 1866. And the same powers and duties have, as the learned Chief Justice has pointed out, been transferred to the Board of License Commissioners.

Before dealing with the question of delegation, can it be supposed for a moment that the Imperial Parliament intended to confer upon the Local Legislatures power to pass laws without the means of enforcing them; and yet it was gravely urged in argument that the right to enforce them by imprisonment would in each case depend upon the will or action of the Dominion Parliament.

Every Government which is supreme must have the capacity to make its own commands obeyed. The Provincial Legislatures, as I have shewn, within their respective spheres, are absolutely supreme. It follows that wherever the Provincial Legislatures have power to enact any particular measure, wherever they may require any thing to be done or forborne in carrying out the powers granted to them by the Imperial Parliament, they must have of necessity the power to enforce, and we should not look for any express power but for the fact that the

criminal law generally is given to the Dominion. Hence it became necessary to give express and exclusive power to the Provincial Legislatures to declare acts of disobedience or acts which have a tendency to interfere with the proposed measures to be crimes, and affix such punishments as it deemed proper.

I incline to agree with the learned counsel for the defendant that the offence here charged comes within the definition of a crime, which has been said to be "an act of disobedience to a law forbidden under pain of punishment;"* but it does not follow that it must or can be dealt with by the Dominion Parliament.

As I have already pointed out, the statute has to be construed as a whole, and where some specific matters are mentioned as within the exclusive power of one body, which but for that reference would fall within the more general description of a subject matter confided to the other, the statute must be read as excepting it from that general description.

If, therefore, it be a crime, the power to punish it is expressly excepted from the general power over the criminal law given to the Dominion, and vested exclusively in the Province, if it is not a crime *cadit quæstio*.

I come to the conclusion that the Provincial Legislature, and the Provincial Legislature alone, has the power to pass laws for the infliction of penalties or imprisonment for the enforcement of a law of the Province in relation to a matter coming within a class of subjects with which alone the Province has the right to deal.

Having this power had they a right to delegate it as they have done to this Board of Commissioners? The learned Chief Justice of the Queen's Bench says: "Such a delegation was of course unobjectionable when done by a Legislature of national authority in both criminal and civil proceeding," meaning thereby the Legislature of the old Province of Canada.

* Harris's Principles of the Criminal Law, p. 1, citing from Sir J. FitzJames Stephens's work.

It appears to me that if this be sound law, and I think it is, it furnishes a solution of the question.

It would seem almost a misapplication of terms to refer to the Provincial Legislature as exercising a delegated authority in the sense of being an agent or delegate of the Imperial Parliament. The Imperial Parliament has the power no doubt to pass laws such as those passed by the Local Legislature and affecting all Her Majesty's subjects in the Province, but it is equally clear that it is a power existing in name only, and one which it would never attempt to exercise, and therefore the Parliament of the Province cannot in that sense be spoken of as exercising a delegated authority.

It is true that Parliament gave both to the Dominion and to the Provinces the constitutions under which we live; both limited in extent, but both giving representative institutions, and giving to the Legislatures elected in the manner therein pointed out, plenary powers of legislation within their respective spheres as large and ample as those of the Imperial Parliament itself. The Legislature so elected have a delegated authority it is true, but it is of the same character as that of the Imperial Parliament, who are collectively the delegates of the whole people.

If these are powers which the Imperial Parliament could have delegated, then they can equally be so delegated by the Legislature of our own Province; if not, then it is unnecessary to add that they cannot be so dealt with by a Provincial Legislature.

I take the case of *Regina v. Burah*, referred to in the Chief Justice's judgment, to be clear authority for this; but it is not conclusive as to this being a delegation of power which would be within the power of the Imperial Parliament.

In the celebrated case of the *Attorney-General v. Sillem, the Alexandra Case*, 2 H. & C. 581, this question was much discussed, and although there was a difference of opinion among the Judges, some of them holding that the power was not given by the statute to make the rule

in question, none of them appeared to entertain any doubt as to the right of Parliament so to delegate its authority. Referring to the objection, the late Mr. Justice Willes, at p. 609, says :

“I think that must fail in the mind of anyone who considers the numerous instances of a similar delegation in the experience of us all. The course of pleading, for instance, in the Courts which I may call Courts of first instance, was always considered to be as much a part of the law of the land as any substantive rule for determining a right of property, or any other right ; and it is always held that such a law could not be changed without the authority of parliament, and yet the noble and learned framer of the Act, known as Parke's Act, the 3 & 4 Wm. IV., c. 42, conferred upon the Judges the power, in effect, of legislating with respect to such a portion of the law of the land. It is true that the power given in that Act was subject to the rules being laid for a certain period before Parliament. But inasmuch as Parliament, without the Crown, could not make a law, inasmuch as Parliament, constitutionally, could not give its assent to an Act of Parliament, simply by having the paper upon which the bill was written or printed laid before it, and inasmuch as in form and substance the assent of the Crown could only be given when both houses of Parliament were present, in effect the power of legislating was given to the Judges with respect to such portion of the law. Now, after referring to such an instance as that, one is almost ashamed to refer to the numerous cases in which towns and other local communities are allowed to determine by the voice of a majority whether certain Acts of Parliament for local government shall or shall not have power within the limits in which the inhabitants reside ; and to make amends for referring to such an instance, I shall content myself for a proof that the delegation of legislative power is no objection, with referring to the 228th section of the Common Law Procedure Act of 1852, by which Her Majesty in Council was authorized to direct that all or any part of that Act of Parliament, making very great changes indeed in the law, should apply to all or any Court or Courts of Record in England or Wales, and that without any authority of the House of Lords or the House of Commons.”

I wish to add that I fail to see any grounds for a distinction in this respect between the powers of a Parliament or Legislature acting under the constitution given to us by the B. N. A. Act and those conferred under the Constitutional Acts of 1791 and 1840, and numerous cases are to be found in which those Legislatures delegated their authority.

In my opinion the judgment should be reversed, and this appeal allowed.

PATTERSON and MORRISON, JJ.A., concurred.

In the Frawley Case :

BURTON, J. A.—I have entered very fully into the questions discussed in *The Queen v. Hodge*, and think it unnecessary to add more than a few words in this case to the judgment of the learned Chief Justice, in which I fully agree.

We find in the British North America Act the very fullest powers of self-government granted to the Provinces—the most ample authority to make laws in reference to the public lands, the establishment of prisons, municipal institutions, the solemnization of marriage, property, and civil rights, and the administration of justice; in relation to all matters, in fact, except those which may affect the whole Dominion; and in the last of these enumerated powers, that which grants expressly the means of enforcing these laws, the Province is authorized to legislate in relation to the imposition of punishment by fine, penalty, or imprisonment, as it is said, for enforcing the enactments which they are so empowered to pass.

It would be a result somewhat surprising and hardly in consonance with the scheme of Confederation if it were to be found that the Legislature, after passing these laws, was powerless to enforce them without the aid of the Dominion Parliament, in the enactment of a law awarding a punishment for their violation; making the Local Legislatures, in fact, dependent upon that of the Dominion; and it would be equally opposed to sound principles of construction in dealing with the words of a Constitution, to place upon the language of the section in question the meaning contended for at the bar—a construction which would cripple the Provincial Governments and render them and the Legislatures unequal to the objects for which they are declared to be instituted. Is there any reason to suppose that the Parliament which entrusted to the Legislatures of the Provinces the power to deal with the property of individuals and the civil rights of communities, without restriction of any kind, intended in any

way to restrict the power of imprisonment when necessary for the enforcement of those laws any more than it has done with reference to the fines and penalties ?

Where the power is granted in general terms, it is to be construed as co-extensive with the terms, unless some clear restriction is deducible from the context.

I accede to the argument that when a Legislature declares that an infraction of its laws shall be punished by imprisonment, that offence constitutes a crime, but I think also that it is a crime with which the Province, and the Province alone, has power to deal.

I was somewhat surprised that we were again pressed with the argument that the Liquor License Act was *ultra vires* as dealing with trade and commerce, an argument which, if pressed to its logical conclusion, would effectually preclude the Local Legislatures from dealing with any particular trade or business within the Province ; and the Privy Council have decided that the words are not to be regarded in any such contracted sense, but to refer to political arrangements in regard to trade requiring the sanction of Parliament, regulation of trade in matters of inter-provincial concern, and possibly general regulations of trade affecting the whole Dominion.

I am of opinion that in this case also the judgment of the Court below was erroneous, and that this appeal should be allowed.

PATTERSON and MORRISON, J.J. A., concurred.

RICKER V. RICKER.

Duty of trustee—Liberty to bid at sale—Innocent purchaser.

The plaintiff was mortgagee of certain lands, and by the will of the mortgagor was devisee thereof in trust to pay certain legacies charged thereon—amongst others one to the defendant, an infant about ten years old. Having instituted proceedings against the defendant to enforce payment of the mortgage, the conduct of the sale was given to the guardian of the infant, and the plaintiff had liberty to bid at the sale under the decree as mentioned, 27 Gr. 576.

Held, [reversing the order then made,] that the liberty to bid accorded the plaintiff, who occupied the two-fold character of mortgagee and trustee, was given him for the purpose of protecting his interests as mortgagee, but did not absolve him from the duty which, as trustee, he owed to the infant; and that the conduct of the plaintiff prior to and at and about the sale, as set out in the case, by means of which he had been enabled to make a profit at the expense of the infant *cestui que trust*, was such as would have rendered the sale invalid if the land had remained in his hands; but as it had passed into those of an innocent purchaser the plaintiff should be charged with the outside selling value of the estate at the time of the sale, or should pay to the defendant the amount due to him under the will, with interest thereon from the date of the sale, together with the costs of the Court below subsequent to the petition, and also the costs of appeal.

THIS was an appeal on behalf of the defendant from, the judgment pronounced upon the petition in this cause in the Court of Chancery by Proudfoot, V.C., on the 17th of August, 1880, as reported 27 Gr. 576, where, and in the judgments on the present appeal, the facts are fully stated.

The appeal came on for argument on the 19th of January, 1880.*

T. Robertson, Q.C., for the appellant, contended that the decree did not authorize a sale in the manner adopted, and it was a duty imposed on the plaintiff to see that the decree authorized what was done; and though the plaintiff had leave to bid, he was still bound to do everything he could to obtain the best possible price, and to take no advantage for his own benefit. It was also contended that when the guardian took the conduct of the sale he became the agent therein of all parties, and the plaintiff could not derive

**Present.*—SPRAGGE, C.J., HAGARTY, C.J., BURTON and PATTERSON, JJ. A.

advantage from the guardian's wrong-doing, which he, the plaintiff, might have prevented, and that his conduct had been an abuse of the process of the Court, by which the defendant's claim had been wrongfully defeated: that the manner of the sale was improper and improvident, and such as no prudent man would have adopted in selling his own property: that the plaintiff was responsible for this, and that by reason of the improvident manner of the sale, the plaintiff had been enabled to buy in the property at a sum greatly below its value. He referred to and commented on *Tennant v. Trenchard*, L. R. 4 Ch. App. 545; *Guest v. Smythe*, L. R. 5 Ch. App. 551; *Campbell v. Walker*, 5 Ves. 678; *Colclough v. Serum*, 3 Bligh 181; *Ex parte Lacey*, 6 Ves. 625; *Dalby v. Patten*, 1 R. & M. 296; *Dean v. Wilson*, 27 W. R. 377.

W. Cussels and Duff, for the respondents, submitted that the appellant was barred by his delay in instituting proceedings to assert his alleged rights, and that as the suit had been defended on behalf of the now appellant by his guardian *ad litem*, who had prepared the advertisement of sale, which took place with the approbation of the Master, the then infant was bound by the proceedings just as though he had been an adult. They also insisted that when the guardian took the conduct of the sale, and the decree gave the plaintiff liberty to bid, it divested the plaintiff of any fiduciary relation to the infant, and placed him in the same position as any outside purchaser; and the evidence established that the plaintiff had paid a fair price for the property and had completed the purchase, having paid debts to the amount of \$175 subsequent to the sale, and he was allowed a commission of \$162, leaving a balance of \$77 due him after deducting his purchase money and subsequent receipts, as set forth in the Master's report; and that under any circumstances the appellant could not succeed in a matter of such a character upon a mere petition with affidavit evidence, even if such affidavits substantiated the charges, which counsel insisted they did not; referring to *McDougall v. Ball*, 10 Gr. 283; *Robertson v. Robertson*,

22 Gr. 443, 456; *Clarkson v. Scott*, 25 Gr. 373; *Daniell's* Chancery Practice, 5th ed., pp. 149, 1290; *Chambers* on Infants, 772; *Lewin* on Trusts, 443; *Simpson* on Infants, 476.

June 30, 1882. SPRAGGE, C. J.—When the plaintiff filed his bill, 25th April, 1865, he combined in himself the several characters of mortgagee, of devisee in fee under the will of the mortgagor of the lands mortgaged, and of trustee under the same will of the same lands; the defendant, then a boy of some ten or twelve years of age being one of several *cestuis que trust*. The testator and the plaintiff were half brothers, and the defendant the son of another half brother.

The mortgage was for \$1200; its date 15th May, 1860; interest payable half-yearly at ten per cent. The mortgagor died very shortly after the making of the mortgage, 6th June, 1860, and probate was granted in the following December to the plaintiff, the other executor having renounced. The bill alleges that the plaintiff did not enter into possession, but received rents and profits, which he applied in payment of debts of the testator; and alleging that Joseph Lehman Ricker was entitled to the equity of redemption, made him sole defendant, and prayed for payment of the mortgage debt and interest, and for foreclosure in default; and offering to account for the personality of the estate come to his hands.

The decree, which was not obtained till the 11th September, 1867, declares the rights of the parties, and of the legatees under the will; directs the usual administration accounts of realty and personality; and, reciting the consent of the plaintiff, orders that the mortgaged property be sold to satisfy the mortgage debt: that the residue, if any, be applied to pay the charges created by the will: that the plaintiff pay into Court out of the residue, if any, the share of the defendant: and that the plaintiff should have liberty to bid at the sale, the conduct of the sale being taken by the *guardian ad litem* of the defen-

dant. It is out of this liberty to bid that the whole trouble has arisen in this case. The *guardian ad litem* was a Mr. Wetenhall, a solicitor of the Court.

The defendant having come of age, has filed his petition complaining of the sale made under the decree; and under his prayer for general relief asks that it may be set aside.

Counsel for the plaintiff object that this is not what is asked for by the prayer of the petition; and it is true that it is not asked for specifically, but it is a relief of a nature which might properly be asked for upon the grounds set out in the petition; and in my opinion may be properly asked for at the Bar.

The plaintiff's counsel also object that under the will of the testator, the defendant has no *locus standi*, to complain of the conduct of the sale: that the bequest to him, \$600, is not made a charge upon the real estate devised; and that at all events he comes, under the will, after legatees whose legacies absorb the whole estate of the testator. The last objection is premature and begs the question. If the sale that is impeached is allowed to stand the estate would be absorbed before the bequest to the defendant would be reached, but if set aside it may or may not be reached. The objection cannot therefore be an objection *in limine* to the petition. I refer also upon this point to the case of *Dance v. Goldingham*, 21 W. R. 761. As to the other objection raised, it can only be raised by going behind the decree. The plaintiff brought the infant into Court as the person entitled to redeem his mortgage; and took a decree, expressing upon the face of it that it was with his consent, giving him an interest in the surplus, if any, after the sale directed by the decree. That must necessarily give him a right to complain that the sale has been so conducted that it has not realized a surplus, which if properly conducted it would have done.

On the other hand, petitioner's counsel have contended, and have cited cases to shew, that a trustee will not be permitted to purchase a trust estate; but that again is going behind the decree. The decree is not impeached by

the petitioner, but what was done after the decree and under it. The then Chancellor, it is not to be doubted was careful to make such a decree as taking it as a whole would not be to the detriment of the infant defendant.

The decree was not carried into the Master's office till 7th October, 1870, more than three years after it was pronounced; and in the interval the plaintiff took the very extraordinary course of making a lease for five years from 1st March, 1870 of the mortgaged premises at a rental of \$200 a year. The sale took place on the 4th of February, 1871, and was made subject to the lease, which at that date had a little over four years to run. The rent, too, was low. Anderson, who afterwards purchased from the plaintiff, says he would have given a rental of \$250, and it was afterwards rented at \$280. The plaintiff, in his affidavit filed in answer to the defendant's petition, says that it was an advantage to have the premises rented at \$200 a year, that it would sell better than if vacant. The place sold consisted of about four acres of land on which stood a good stone building used for the thirteen previous years as a tavern, also a stone barn and shed, and a frame barn and other outbuildings, a stone blacksmith's shop, and a well; there was also a garden and a young orchard. I should have thought certainly that selling such a place with the possession of it for four years barred by a lease, would narrow the number of purchasers to those who would purchase for investment, and that the property would therefore be offered for sale at a disadvantage. It would suit the plaintiff himself; and it looks as if done for the purpose of benefiting himself. He seems to have taken upon himself to do this. If instead of doing it he had carried the decree into the Master's office (which he was at liberty to do at any moment, and which he ought to have done years before), and had asked the sanction of the Master to such a lease it would, I should say, have certainly been refused.

What he did may properly be looked at in the light of what afterwards occurred. Having let to Anderson he

went to him shortly before the sale, and Anderson thus states what passed between them: "Ricker came to my place and asked me if I would buy the place; he said it was going to be sold, and asked me to go to the sale with him; he said he would bid on the place himself, and that I should have it at the same price it was knocked down to him; he said he could buy it cheaper than I could; he said that I was not to bid, and that I should have it for whatever it was knocked down for. I agreed to this. He was to run it as high as \$2500. I told him that I would not give any more; that was settled upon. I went to the sale with the plaintiff, and it was knocked down at \$2250. I suppose the purchaser was to pay the mortgage then on the place out of the purchase money. I might have bid at the sale if I had not made arrangements with the plaintiff. I wanted the place."

The whole has the air of a contrivance; the lease being part of the plan, to get the place into his own hands at as low a price as possible in order to make a profit out of it for himself: that this was the *effect* of what was done is quite clear. I am quite justified in making these observations, for, as was observed by Lord Chancellor Brady, in *Atkins v. Delmege*, 12 Ir. Eq. 8, speaking of sales by the Court: "It involves in its consideration the sale of property under the decree of this Court; the duty of the solicitors who have the conduct of such sales, and of the Court itself in seeing that its decrees are duly and rightly administered."

I may as well state here what I conceive to be the law applying to this case, and how the conduct of a party in the position of this plaintiff is to be regarded. Allowing him to bid at the sale was allowing him to place himself in a position where his interest was, or might be to some extent, in conflict with his duty; but it did not sink his character of a trustee under the will into that of a prospective purchaser, so that what would have been a breach of trust if he had not been allowed to bid was divested of that character because he was allowed to bid. It must be

assumed that he was allowed to bid to protect his own interests as a mortgagee and as devisee; but if he used that permission to prejudice the interest of his *cestui que trust* in order to benefit himself it was an abuse of the permission granted to him. A stranger might do what he owed as a matter of duty to this defendant not to do. If a stranger would have given for this property a sufficient sum to satisfy the plaintiff's mortgage, and also to pay or towards the payment of, the legacy bequeathed to this defendant it was the duty of this plaintiff at least to abstain from doing anything that would prevent such a sum being realized at the sale. But what the plaintiff did was actively to intervene to prevent a stranger giving for the land a sum that would have gone towards the payment of the infant's legacy; and he did this in order to benefit himself; and he did thereby benefit himself, and will hold the benefit thus obtained by his breach of duty, if his purchase at the sale by auction cannot be impeached. The lease to Anderson, the request to him not to bid at the sale, with the promise to sell to him again, and his own purchase should be all looked at together, and not looked at with a view to placing upon his conduct the best construction it will bear, but with a careful scrutiny, to see whether what has resulted in benefit to himself, was not done with that intent, in disregard of the interest of the infant, and so in breach of duty.

I should have supposed that it would scarcely be questioned that what I have stated to be the rule of law in this respect is correct. I am glad, however, to be fortified with a case which I think fully bears out what I have said.

There was a property in regard to which, and to the charges upon it, there was a great deal of litigation. A bill was filed first by a Mr. Minnett; then another bill was filed by a Mr. Darby, and in the latter case a decree for the sale of the property was obtained, and the property was purchased by one Fawcett for Minnett. The sale was afterwards impeached by a bill filed by a Mr. Talbott, and it is for

the observations of the Court upon the hearing and disposition of that suit that I refer to the case, 6 Ir. Eq. 83. Counsel for the defendant Minnett, in supporting the sale, observed that the decree for a sale of the inheritance for payment of Minnett's demand was correct, and if so, that a sale for too much will not affect the purchaser. Upon this Baron Pennefather said: "That may be an argument for a purchaser under a decree, who is a stranger to the cause, but not for the person who becomes the purchaser under a decree obtained by himself. If a party to the suit purchases under the decree, he must submit to have the transaction examined with the utmost 'strictness,' and Baron Lefroy followed, drawing the like distinction between a purchase by a stranger and by a party to the suit. And Chief Baron Brady, in delivering judgment said, at p. 95: "It further appears that the person who purchased the property under the decree is himself the person through whose instrumentality that decree and sale were obtained. Under these circumstances I cannot entertain a doubt that this purchaser—for we are not called on to consider the case of an ordinary purchaser under a decree, whether he is relieved from the necessity of investigating these matters, or whether, as was intimated in *Gore v. Stacpoole*, 1 Dow, 30, he must inquire into them—I say, I cannot entertain a doubt that this purchaser cannot resist the relief prayed for. He is the person who set the Court in motion; who has taken the benefit of his own acts; and who, in truth, was both the seller and purchaser of the estate."

It does not appear in that case what party had the conduct of the sale. It certainly was not the purchaser, or that fact would have been commented upon. It would, besides, have been entirely against the practice of the Court. The Judges of the Irish Equity Courts, I may observe, were peculiarly conversant with the law and practice in the case of sales under the direction of the Court, the ordinary course of proceeding in mortgage suits being by sale, while in England it has been by foreclosure.

The case against the purchaser is a much stronger one in the case before us than was the case in *Talbott v. Minnett*, inasmuch as in this case his position, besides being that of the purchaser as in that case, was that of a trustee, and I cannot myself doubt that his being a party to a suit for the purposes for which he filed his bill, and being allowed the privilege of bidding at the sale directed by the decree at his instance, did not absolve him one iota from the duty which, as trustee, he owed to the infant defendant.

The learned Judge, whose order is appealed from, cites Mr. Lewin's book on Trusts, 7th ed., 443, for this proposition: "When the decree gave the plaintiff liberty to bid at the sale, it put the parties at arm's length; it divested the plaintiff, so far as the sale was concerned, of any fiduciary relations he might have sustained to the infant; entrusted the conduct of the sale to the infant's guardian, and in effect placed the plaintiff in the position of an outside purchaser." Mr. Lewin gives some very exceptional instances in which the Court will allow a trustee to purchase; but I do not find anything in his book that goes the length for which his book is referred to. In fact his whole chapter on "purchases by trustees" is against it. The case of *Talbott v. Minnett*, to which I have referred, is in direct conflict with it, and in my humble judgment reason and principle are also against it. The plaintiff, filling the several positions that I have already said he combined in himself, among them that of trustee for the defendant, has a privilege accorded to him somewhat out of the ordinary course and practice of the Court. That privilege does not *per se* carry with it any thing beyond the bare permission to bid at the sale. It is not necessary, in order to the exercise of that privilege, that he should be absolved from any duty which, but for the granting of that privilege, was incumbent upon him; and certainly it is not a necessary implication from what was in terms granted, that his position should be different in any respect, in which it was not made different by the order

which he obtained ; and it is to be observed that the further change of position contended for was a something for his own benefit, and which he might use to the prejudice of the infant ; and this surely was not to be *implied*.

I have so far only noticed two points particularly in which the plaintiff failed in the duty imposed upon him by his position. There were others also, the effect of which was to cause the land to be carried to a sale, to the disadvantage of the infant.

The land ought not to have been offered for sale subject to the mortgage. It was a departure from the ordinary course ; which is to sell the land itself, not the equity of redemption in the land ; and purchasers then know exactly what they are buying. The money is paid into Court and incumbrancers are paid in their order ; and where an incumbrancer is a purchaser, he is in a proper case excused from paying in moneys which would be payable out to himself. I have examined a number of forms given in Mr. Seton's book and in Mr. Daniell's, and have referred to the statement of practice by the latter, and I gather from them that the practice is uniform to sell in the manner that I have stated.

But the still more serious error, if only error it was, was to misstate—that is, to overstate—the amount due upon the mortgage. Bidders, of course, would measure the amount they would bid beyond the mortgage debt by the amount stated to be the mortgage debt. It was therefore all-important that the amount should not be overstated. The amount really due upon the mortgage, as appears by the affidavit of the plaintiff's solicitor, was \$947.64, or as stated in the Master's report, including the guardian's costs (which I must say were not earned by attention to the interests of the infant), \$1,124.64. The advertisement only stated that the sale was subject to the mortgage, without stating the amount—that also was a circumstance of detriment to the sale. At the sale the plaintiff says the amount due was declared to the audience, but how declared ? Declared as being from \$1,200 to \$1,500, or

thereabouts. That is the way in which the plaintiff says it was stated to him by his solicitor, and he says that it was declared to the audience. The inference is, that it was declared in that way. This was simply inexcusable, a careless trifling with the interests of the infant, if not done designedly for the interest of the plaintiff, whose duty it certainly was to ascertain exactly and to state truly the amount due. Bidders could not feel safe in taking the amount at less than \$1,500, and the loose word "thereabouts" they would feel would or might cover something more. The costs, subject to which also the land was sold, were stated at \$450. Bidders with these figures and the word "thereabouts" would not feel safe in taking the land to be set up, subject to charges amounting to less than about \$2,000.

Now the amount really due upon the mortgage being \$947.64, and the whole costs, which appear to have been somewhat understated, being \$691—the charges for the mortgage debt and costs should have been stated at \$1638.64 and that, instead of about \$2000, would have been the starting point from which intending purchasers would have bid. It is manifest that the land went to sale in a manner detrimental to the interests of the infant: that the plaintiff is chargeable with neglect of duty in several particulars, and that he profited by misconduct with which he is chargeable. It is shewn that he obtained the land for considerably less than its value, even taking its value at the sum for which he sold it to Anderson. It was knocked down to him for \$240 beyond the stated incumbrances; that sum added to the proper amount of incumbrances is \$1878. He sold it to Anderson for \$2500, the difference being \$622.

I have made a calculation from the Master's report which (correcting an error of \$40 against the plaintiff) would make the balance due to him *on all accounts*, including payments of debts and legacies, a little over \$2000—\$2015.87.

We cannot say what the land might have brought if

the plaintiff had done all his duty, and nothing contrary to his duty. Anderson, after getting a conveyance from the plaintiff, sold the place to one Patrick for \$3700. One witness says Patrick paid too much. Anderson speaks as if the value of the land when he sold to Patrick was about the same as when he purchased from the plaintiff, and worth what he sold it to Patrick for; and that it would rent for \$300 a year. When he gave his evidence, May, 1880, the hotel premises, by which I understand not the whole of the premises, were under rental for \$280 a year.

In my opinion the plaintiff's purchase could not be allowed to stand if the property were still in his hands: that in that case there would properly be either a resale or a direction that the plaintiff should pay to the petitioner (the defendant, now of age) the amount payable to him under the will. The property having now passed into the hands of an innocent purchaser there should be either an inquiry what was the selling value of the premises at the time of the sale, the Master taking the outside selling value as the value at which as against a wrongdoer it ought to be taken; or the plaintiff should be ordered to pay to the petitioner the amount payable to him under the will. I incline to think that a direct order upon the plaintiff to pay that amount, would do no more than justice to the petitioner. I am prepared, however, to agree to what is proposed upon that point in the judgment of my brother Patterson.

That he should be allowed to make and to retain a profit out of his dealing with the estate in the improper way that he has dealt with it, appears to me impossible. The only question with me is how the wrong done by him should be righted. I should be content with either of the modes that I have suggested.

The plaintiff should pay the costs of and subsequent to the petition, including the costs of the appeal.

HAGARTY, C. J.—I fully concur in the judgment which has just been read by the learned Chief Justice; and in

doing so must say that in my opinion a wrong has been done the defendant, I might say a great wrong has been done him, and I would have regretted extremely had the practice of the Court of Chancery been such as to have prevented his obtaining relief under the circumstances of this case.

PATTERSON, J.A.—For the purpose of explaining our understanding of the position of accounts between the plaintiff and the estate of which he was executor, it will be sufficient to refer very concisely to the results of the figures printed in the appeal book, and forming the foundation of the Master's report of 1st December, 1871. The report itself contains at least one obvious error, being a discrepancy of \$40 between the balance of \$457.16 mentioned in paragraph seven, and the factors by which that balance is produced. The account shews the same balance, which we therefore take to be correct; and, shewing also whence it comes, we act on the figures there given; particularly as there is nothing to explain why those in the report should differ from them.

In other respects the details given in the accounts aid us in fully understanding the import of the findings in the report.

We gather that the plaintiff was chargeable, up to the time of the sale on the 4th February, 1871, with \$2,402.22 for rents of the property covered by his mortgage, less \$323.08 paid for repairs, taxes, and insurance, leaving a net sum of \$2,079.14 of those rents.

He had also realized \$755.55 from assets which the Master classes as personal property.

These two sums together made \$2,834.69. Out of this he paid debts to the amount of \$1,212.71, leaving \$1,621.98 unexpended.

He shews by an affidavit that he had not applied the surplus rents in payment of interest or principal to himself upon his mortgage, but submits to have the amount in his hands applied in that way.

The amount of his mortgage at the time of the sale, made up of \$1200 principal, and interest at ten per cent. from 16th May 1860, was \$2,485.62. Deduct from this the balance of \$1,621.98, and we have the sum of \$863.64 remaining due. This, it will be observed, is irrespective of costs, which will be reckoned by and by, but which enter into the Master's computation of the amount given in the 9th paragraph of his report.

The circumstances leading up to and connected with the sale have been commented on by his lordship the Chief Justice, who has pointed out the breaches of his duty as trustee of which the plaintiff was guilty.

Clearly the circumstance that the conduct of the sale had been given to the defendant, in order that the plaintiff might be permitted to bid—a permission obviously given to enable him, in his own interest, but still not without regard to the interest of those for whom he was trustee, to avert a sacrifice of the property—could not justify his being a party, either by words or by silence, to an overstatement of the incumbrance at a sale where bidders were invited to compete, not for the land itself, but for the equity of redemption.

The trustee, being himself the holder of the incumbrance, became in effect the purchaser of the land. We should lose sight of the substance of what was done, and pay undue regard to the form, if we failed to treat the plaintiff's purchase as the purchase of the land, at a price equal at least, to the maximum amount stated as the incumbrances plus the amount of his bid. But in confining ourselves to this price, (which would be $\$1,500 + \$450 + \$240 = \$2,190$) we should most likely err on the side of leniency to the plaintiff at the expense of justice to the defendant. The overstatement was not the only act calculated to prejudice the sale, for which the plaintiff was responsible. There was the lease which, two years and a half after obtaining his decree and shortly before he carried it into the Master's office, he had made. The effect of the lease, without questioning the adequacy of the rent,

would be to keep away a class of bidders not unlikely to attend a sale of a tavern stand, viz. persons desiring immediate occupation of the premises and not buying merely as an investment.

The depreciation which this may have caused is probably a matter which is not susceptible of proof. But in view of the fact of the lease, and bearing in mind that, immediately after the sale, the plaintiff resold the property for \$2,500, there does not seem to be any reason to apprehend that an injustice will be done to him by adopting that sum as the price at which he ought to account.

There is ample reason for charging him with this amount irrespectively of the interference with Anderson to which that witness swore, but on the accuracy of whose evidence the Vice-Chancellor seemed not fully to rely.

Then, taking the purchase money to be \$2,500, we have to deduct from it several sums, viz :

Amount paid for debts after sale.....	\$175 00
Costs of suit and sale	691 80
Commission allowed plaintiff as executor, &c.	162 42
Balance of mortgage debt.....	863 64

Making in all.....\$1893 86

Allowing this amount against \$2,500, there remained unpaid \$607.14.

The decree should be in one of two ways, between which it may perhaps appear that there is not much practical difference. The plaintiff should either pay to the defendant the sum of \$607.14 with interest from the 4th February, 1871, or pay him his legacy of \$600 with proper interest upon it.

It is not necessary for us to construe the will of Joseph Lehman, of which the plaintiff is executor, further than to ascertain from what period the defendant's legacy of \$600 should bear interest.

The will directs payment of funeral charges and just debts, and then proceeds to dispose of the residue of the testator's estate and property not required for those pur-

poses and for the expenses of administration. First, there are bequeathed five legacies, viz.: one to the defendant for \$600; three of \$200 each, to the testator's half-brothers David and Frederick Ricker and his sister Ann Deagle; and a specific legacy of furniture to David's wife. Then there is a devise to the plaintiff of three parcels of land. Two of them the testator describes as his property in Rockton, being the hotel premises and another lot. The third is a town lot in Dundas, which the testator describes as having been obtained by the foreclosure of a mortgage, and his right, title, and interest in which he devises and directs to be sold the first favourable opportunity.

It may be here remarked, parenthetically, that the Dundas lot was conveyed to Messrs. Notman & Barton in satisfaction of a debt for which they had a lien on it. It appears in the accounts, on the one side as \$300 of personally realized by the executor, and on the other side, as a debt of \$300 paid by him. The executor is also charged with \$255.55 for "rents, &c., of Dundas property;" those two sums, together with \$200 received upon an award, forming the item of \$755.55 already mentioned. The Rockton property is that which was the subject of the sale in question.

The will then proceeds thus:

"And all the residue of my goods and chattels to be equally divided amongst all my heirs before mentioned. The said several money legacies to be paid in the time and manner following, that is to say: that to David Ricker, in five years after my decease; that to Frederick Ricker, six years after my decease; that to Ann Deagle, in seven years after my decease; the legacy to Joseph Lehman Ricker to be paid as follows, viz.: the overplus of money derived from my real estates as rent, after paying my just debts and all expenses, said overplus of money to be put out to interest ten years after my decease, and the overplus of rents to be added thereto yearly until the said Joseph Lehman Ricker is of the age of twenty-one years, when he is to receive the before mentioned legacy and the interest made on the same. The above mentioned real estate, I will and bequeath to Christopher Ricker, as

before mentioned, to have and to hold the premises above described to the said Christopher Ricker, his heirs and assigns forever.

The testator evidently contemplated the payment of all the pecuniary legacies out of the rents, or at least had in view the possibility of a resort to the rents being necessary to provide for the payment of the three smaller ones, which he therefore postpones the payment of for five, six, and seven years respectively. The defendant's legacy is in terms charged upon the land, and a delay of ten years allowed before it became obligatory to invest the surplus rents to provide for it. The end of ten years is therefore the earliest period at which any part of the legacy was to begin to bear interest.

We are not concerned with the other legacies. See *Ricker v. Ricker*, 14 Gr. 264.

The testator died on 6th June, 1860. The ten years expired on 6th June, 1870. At that date the rents of the Rockton property must have amounted to upwards of \$2200.

At the first glance it would strike one as probably inequitable to allow the plaintiff, while he held these rents, or what remained of them after paying the debts, to compute interest on his mortgage at ten per cent. on the whole principal money. But we have to consider how far it can be said that the defendant's interests were prejudiced by the neglect either to invest the surplus or to apply it from time to time on the mortgage.

Reverting to the figures already given, we find that the debts paid out of the rents and personalty being \$1,212.71, and the personalty \$755.55; the amount of these rents expended in paying debts was \$457.16, or upwards of two years' rent. Therefore there would be probably three years, arrears of interest upon the mortgage, or \$360, before any rent was applicable to the mortgage debt. Pursuing a calculation of this kind, it would appear impossible to say, in the absence of evidence of actual transactions, that any surplus over the interest would remain either for investment

under the terms of the will, or for application in reduction of the principal debt, before the seventh year, and then there would be each year only the difference between \$200 of rent and \$120 of interest.

Thus we find that, having regard to the fact that the interest, though at what would now be considered a high rate, is computed only as simple interest, there is nothing before us from which we could infer with any certainty that the balance of \$421.98 (being the excess of the rents over debts paid, or \$1,621.98 less \$1,200 for ten years interest) remaining in the plaintiff's hands immediately before the sale ought to have been larger. In addition to which, we have to bear in mind that at that time there were still over \$300 of debts to pay, which the plaintiff afterwards compromised for \$175, and no deduction had then been made for his allowance as executor.

Upon the whole there is no reason to be deduced from the evidence we have, for supposing that the defendant can justly ask for more than the balance of \$607.14 and interest from the date of the sale, and no basis on which any other computation can properly be made.

BURTON, J. A.. concurred.

TURLEY V. BENEDICT ET AL.

Life lease—Proviso for re-entry—Ejectment.

The defendant leased to his father the lands in question in this action for life, to work and enjoy the same, but that should the father in his later years become incapable of taking charge of the place as it should be by good husbandry, then and in such case the defendant was to be at liberty to govern the lands as seemed best to him. And in the event of the father becoming incapable of manual labour he was to be supported by the son, and it was agreed that, subject to the son's rights, the father was entitled to peaceable and quiet possession. The father became incapable of taking proper care of the place, and in consequence the defendant re-entered and worked the farm. Subsequently thereto the interest of the father was sold by the sheriff to the plaintiff, who brought ejectment. The jury having found the facts as above stated: *Held* [reversing the judgment of the Court below], that the defendant had, according to the terms of the lease, the right to possession, and that the plaintiff must therefore fail in his action.

THIS was an appeal by the defendants Andrew Benedict and Ami Benedict, from a judgment of the Court of Common Pleas setting aside a verdict which had been entered for them by Patterson, J. A., and directing a verdict to be entered for the plaintiff Patrick Turley, as reported 31 C. P. 417, where the instruments under which the respective parties claimed and the facts of the case are clearly set forth.

The appeal came on for argument before this Court on the 16th November 1881.*

G. D. Dickson, for the appellants. The intention of the father and son as evidenced by the instruments executed between them was to provide from the funds of the son for the proper support and maintenance of his father and mother: the land itself was conveyed to them for life, such life-estate being liable to be defeated in the event of their becoming unfit to take proper care of their property and by this means earn sufficient for their support: failing that, the son was to take possession, work the farm for his own benefit, and out of his own earnings support and

* *Present*.—SPRAGGE, C. J., BURTON, PATTERSON, JJ. A., and ARMOUR, J., Q. B. Div.

maintain his father and mother. It has never been contended that the son was to allow his parents to retain possession of the land, and also support them; and that this was the view entertained by the father and son is shewn by the fact that they had so acted upon it before the plaintiff had acquired any right or title in the property.

Bethune, Q. C., and *Clute*, for the respondent. The lease executed by the son to his parents created an estate of freehold, that is for the lives of David Benedict and his wife and the life of the survivor of them; and the husband having survived his wife his interest passed to the plaintiff under the sale by the sheriff and his deed executed in pursuance thereof.

The lease contains no clause for re-entry, and the demise being free from any uncertainty or contingency capable of defeating the estate created by it, could be defeated only by terms as strong as those creating it.

The lease contains a covenant for quiet enjoyment, which runs with the land, and the plaintiff is entitled to avail himself of it.

Agar v. Stokes, 5 App. 180; *Ford v. Beech*, 11 Q. B. 842; *Rhodes v. Forwood*, L. R. 1 App. Ca. 256; *Wynham v. Carew*, 2 Q. B. 317; *Willson v. Phillips*, 2 Bing. 12; *Campbell v. Lewis*, 3 B. & Ald. 392; were referred to.

June 30th, 1882. SPRAGGE, C. J.—The action is ejectment, the plaintiff claiming title under a sheriff's deed, upon an execution against the lands of David Benedict, the father of Andrew Benedict, a defendant in this suit.

The case may be disposed of upon a short point, without determining whether there was a defeasance of the life-estate, upon the happening of either of the contingencies provided for in what the parties call a "life-lease" from the son to the father; or whether there was a subsequent surrender of the life-estate of the father from him to the son.

The point is this. What the parties agreed to was, that in the first place the lessees, the father and his wife, should have, work, and enjoy the farm themselves; and if that

state of things had continued, the plaintiff upon his purchase in execution of the life-estate of the father would, it may be assumed, be entitled to recover in ejectment. But that state of things did not in fact continue. There were two contingencies provided for. It is not necessary to consider the first. The second is in these terms : "Should the party of the second part (the father and his wife) be incapable of taking charge of the place in his after years, as it should be done by good husbandry, then the party of the first part, (the son) govern the above mentioned lands as seems best to him." Then follows a provision not material to the case, and then the words "with the exception of the party of the first part, the said party of the second part is to have peaceable and quiet enjoyment" The jury found that the father, before the son re-entered on the land, had become incapable of taking charge of the place as it should be done by good husbandry; and the evidence shews that the son has ever since worked and managed the farm.

The matter then stands thus : Upon the happening of a certain contingency, which the jury has found did happen, it became the duty and the right of the son to do that in regard to the land which he could not do without having possession of it. He had at least the right to have possession, for he was to have the right to "govern" the land "as seems best to him," and he did in pursuance of this provision enter upon and work the farm, and had possession of it.

The instrument entered into by the father and son stands unimpeached; and the only question in this possessory action is, whether according to the terms of it the son is not entitled to the possession. I can come to no other conclusion than that he is so entitled; and am of opinion that the judgment should have been for the defendants. I do not say that the plaintiff is without remedy. All that is necessary or proper to say in this case is, that he is not entitled to our judgment in this suit.

BURTON and MORRISON, JJ. A., concurred.

ARMOUR, J.—The Court of Common Pleas have not, in my opinion, placed the proper construction upon the terms of the instrument of the 1st of October, 1868, "Should the party of the second part be incapable of taking charge of the place in his after years as it should be done by good husbandry, then the party of the first part govern the said above mentioned lands as seems best to him."

This is not an agreement that in the event of the party of the second part becoming incapable of taking charge of the place in his after years as it should be done by good husbandry, the party of the first part should manage the farm *for the benefit of the party of the second part*, but it is an agreement that in that event the party of the first part should control and work the farm *for his own benefit*, subject however to the previous provision that "Should the party of the second part, either or both of them be deprived of reasoning faculties, or incapable of manual labour, they are to have their support in a comfortable and respectable manner while they shall live from the party of the first part."

It was manifestly the understanding of the parties in making these stipulations that if the party of the second part should be deprived of reasoning faculties, or incapable of manual labour, he would in those events be incapable of taking charge of the place as it should be done by good husbandry.

It was clearly therefore not the intention of the parties that the party of the first part should, in those events, not only govern (in the sense of manage) the farm for the benefit of the party of the second part, but should also support them in a comfortable and respectable manner while they should live; but the intention was that in those events the party of the first part should govern (in the sense of control and work) the farm for his own benefit, and should support them in a comfortable and respectable manner, as a compensation for the benefit he would thus derive from so governing the farm for his own benefit.

This interpretation carries out the true intention of the parties, and is that upon which they acted when the father (the party of the second part, his wife being then dead,) gave up possession of the farm to the son (the party of the first part) and the son entered into possession of it and agreed to pay the father to the value of \$150 a year for his support.

The son, one of the present defendants, was in possession of the farm under this agreement, and under these circumstances, when the plaintiff's writ against the lands of the father was placed in the sheriff's hands, and under it and the sale and conveyance made by the sheriff to the plaintiff under it, the plaintiff could acquire no greater right to the possession of the farm than the father had, and it would not have been possible for the father, in the face of his covenant above set out, nor is it possible consequently for the plaintiff to deprive the son of the possession of the farm.

The effect of this interpretation is not necessarily to determine the life-estate, but to make the son the sub-lessee of his father for the residue of that estate.

It may, however, be contended that such a sub-lease would be an assignment, and being made to the owner in fee would be merged in the fee, but I do not think that it would operate as an assignment against the intention of the parties, nor that if it did it would, under the circumstances, be merged.

[See *Pollock v. Strong*, 9 Q. B. 1033, and *American Law Review* for January, 1882, where *Pollock v. Strong*, and all the other cases on the same subject in England and America, are reviewed.]

This construction, however, would be fatal to the plaintiff's claim.

If the interpretation I have placed on the instrument of the 1st of October, 1868, be not the true one, then what took place when the father gave up possession of the farm to the son, and the son entered into possession of it, and agreed to pay the father to the value of \$150 a year for his support, was wholly inconsistent with the terms of the instru-

ment, and in such case operated as a surrender of the father's term by act and operation of law.

See *Lyon v. Reed*, 13 M. & W. 285. This too would be fatal to the plaintiff's claim.

In my opinion the appeal should be allowed, with costs; and the rule in the Court below discharged, with costs.

EMMETT V. QUINN.

Lease, short form of—Covenants not statutory—Covenants running with land.

In a lease, expressed to be made in pursuance of the Act respecting short forms of leases, the covenants, in place of the words "the lessee covenants with the lessor," were commenced with the words "the said party of the second part covenants with the said party of the first part." Then followed covenants representing the statutory short form covenants, and a covenant to build a house on the demised premises; and another covenant to rebuild in the event of the building so erected during the term being destroyed by fire. This last covenant was introduced by the words, "and the said party of the second part further covenants with the said party of the first part."

The lessee, with the assent of the lessor, assigned the lease, and the assignee built in pursuance of the covenant, and executed a mortgage to the defendant, and on the buildings being burnt down re-built them. Subsequently the defendant, on default of payment, sold, under the power in his mortgage, to one N., who assigned the leasehold interest in the property to the defendant, and thereafter the buildings during the occupation of the defendant were again destroyed by fire.

Held, (1) that the covenant to rebuild derived no aid from the statute, and was to be read as made by the lessee for himself alone and not for his assigns, and the decree of *BLAKE, V. C.*, 27 Gr. 420, was reversed; *SPRAGGE, C. J.*, *BURTON*, and *MORRISON, J.J.A.*, holding that the covenant being in respect of something not *in esse* at the making of the lease did not run with the land, and did not bind the defendant: *PATTERSON, J. A.*, dissenting, on the ground that the building having been erected before the assignment to the defendant, the covenant ran with the land and bound him:

Held, (2) by *SPRAGGE, C. J.*, *BURTON*, and *MORRISON, J.J.A.*, that the covenant to build not being one of the statutory covenants, must be read as being made by the lessee for himself alone and not for his assigns:

Per PATTERSON, J. A.—That the short form words introductory to the covenants should be read as if extended in the long form upon the deed; and therefore the words "for himself, his executors, administrators, and assigns" applied to the covenant to build, though not to the covenant to rebuild.

Per PATTERSON, J. A.—The use of the words "party of the first," and "party of the second part," inserted in the introductory part of the covenants was a sufficient compliance with the provision of the statute, in respect to short forms of leases, which says that any *name* or *names* may be substituted for the words "lessor" and "lessee."

Remarks on *Minshull v. Oakes*, 2 H. & N. 793.

THIS was an appeal by the defendant from a decree in the Court below, whereby it was declared that the plaintiff was entitled to damages against the defendant for breach of the covenant to re-build the premises in the lease in the pleadings mentioned, and whereby it was referred to the Master of the Court at St. Catharines, to ascertain and state the amount of loss the plaintiff had sustained, by

reason of the breach of the said covenant, and to tax to the plaintiff his costs.

The lease referred to in the pleadings, was as follows :

"This indenture, made the 21st day of September, 1874, in pursuance of the Act respecting Short Forms of Leases. Between William H. Emmett, * * of the first part, and John F. Robinson, * * of the second part. Witnesseth that in consideration of the rents, * * on the part of the said party of the second part, his executors, administrators, and assigns, to be paid, observed, and performed, the said party of the first part, hath demised * * unto the said party of the second part, his executors, administrators, and assigns, all and singular, that certain parcel or tract of land and premises, situate, * * To have and to hold the said demised premises, for and during the term of twenty years, to be computed from the day of the date hereof and from thenceforth next ensuing, and fully to be completed and ended : Yielding and paying therefor yearly, and every year during said term, unto the said party of the first part, his heirs, executors, administrators, or assigns, the sum of seventy-five dollars per year, for the first ten years of said term, and the sum of one hundred dollars per year, for the last ten years of said term, of lawful money of Canada, to be paid on the following days and times, that is to say : * * And the said party of the second part, covenants with the said party of the first part, [1] to pay rent and to pay all taxes, dues, and charges, which are, or may be assessed against the said demised premises, during the said term, whether municipal, parliamentary, or otherwise, and to repair and keep up fences, and that the said party of the first part, may enter and view state of repair, and that he will not assign or sub-let the said premises or any part thereof, or this lease without leave, and that he will leave the said premises in good repair.

[2.] "And also that he will erect, put up, and build upon said demised premises, a good substantial dwelling-house and other buildings to the value of not less than \$2000, and at the end or sooner determination of said term, from what cause soever, he will leave the said buildings and all buildings and fences erected by him upon said premises, thereon, and the same property shall be the property of the said party of the first part.

[3.] "And the said party of the second part further covenants with the said party of the first part, that he will commence the erection of the said buildings within six weeks from the date of this lease, and that he will prosecute the work upon the same to completion within three months from the date hereof, and that in default of commencing the said building within the above mentioned time, or having the same completed within the said time, then this lease shall be and become void, and the term hereby created shall immediately become forfeited, and the party of the first part shall be at liberty to retake and have again the said demised premises ; and the party of the second part shall forthwith pay unto the party of the first part all and whatsoever sum or sums of money he, the said party of the first part shall have paid in connection with the

drawing of this lease, and any expenses which he may be put to in getting possession of said premises,

[4.] " And that he will insure and keep insured, during the last ten years of the said term, the buildings to be erected upon the said demised premises, in some good, solvent insurance company, to be approved of by the party of the first part, in the sum of \$2000 at least, and assign the policy or policies to the party of the first part, and that he will pay the premiums upon said insurance, as the same shall become due, and in case of default in so doing, this lease and the term hereby created to become void.

[5.] " And that in the event of the said buildings being destroyed by fire during said term, he will immediately re-build to an equal amount; and in case the said buildings shall be destroyed during the last ten years of said term, the insurance moneys recovered for the buildings destroyed shall be applied to the erection of such new building; but the party of the first part shall not be obliged to pay the insurance moneys he may have received toward the erection of such new buildings, until the same shall be in course of erection, and then only in payment in proportion to the amount of work performed upon such buildings, the clause hereinbefore set out in reference to insurance of buildings to apply in every respect to such new buildings.

[6.] " And that he will at the end, or sooner determination of the said term, quietly leave and surrender the said premises to the said party of the first part, with the appurtenances.

[7.] " And that in case the rent reserved, shall at any time be in arrear and unpaid for the space of fifteen days, after any of the days of payment or in case of the breach of any of the covenants contained in this lease, by the party of the second part, it shall be lawful for the party of the first part, his heirs, executors, administrators, or assigns, to re-enter upon and have again the said demised premises, and to expel, and remove the said party of the second part, therefrom.

[8.] " And that if the term hereby granted shall at any time be seized, or taken in execution or attachment, by any creditor of the said party of the second part, or if the said party of the second part shall make any assignment for the benefit of creditors, or becoming bankrupt or insolvent, shall take the benefit of any Act that may be in force for bankrupt or insolvent debtors, the then current rent shall immediately become due and payable, and the party of the first part, his heirs, executors, administrators or assigns, shall be at liberty to distrain at once, for said current rent, and the said term shall immediately become forfeited and void.

" Proviso for re-entry by the party of the first part on non-payment of rent or non-performance of covenants.

[9.] " The party of the first part covenants with the party of the second part, for quiet enjoyment upon payment by him of rent and taxes, and performance of covenants."

The appeal came on to be heard on the 20th September, 1880, and in consequence of the death of Moss, C. J., before

judgment was pronounced, was again argued on the 13th September, 1881.*

MacLennan Q. C., and *McClive*, for the appellant.

P. McCarthy and *W. Cassels*, for the respondent.

The other facts in the suit and the questions raised, are clearly stated in the report of the case in the Court below (27 Gr. 420) and in the judgment.

June 30, 1882. BURTON, J. A.—This case is an illustration of the importance of adhering strictly to the form of words prescribed in the schedule when using the statutory short form lease.

The question raised is as to the liability of the assignee of a lessee to rebuild a house not in existence at the time of the original lease, but which the lessee in that instrument covenanted to build within a certain specified time.

That covenant was in these words: "And also that he will erect, put up, and build upon the said demised premises a good, substantial dwelling-house and other buildings to the value of not less than \$2,000, and at the end or other sooner determination of the said term, from what cause soever, he will leave the said buildings, and all buildings and fences erected by him upon the said premises, thereon, and the said property shall be the property of the party of the first part."

There is also a covenant to keep insured during the last ten years of the term the buildings to be erected—which means, I suppose, those covenanted to be erected, not all buildings which the lessee might choose to erect—and assign the policies of insurance to the lessor.

Then follows this covenant, upon the construction of which, in my opinion, the whole question turns: "And that in the event of the said buildings being destroyed by fire during the said term he will immediately rebuild to an equal amount, and in case the said buildings shall be

Present.—SPRAGGE, C. J., BURTON, PATTERSON, and MORRISON, JJ.A.

destroyed during the last ten years of the said term the insurance moneys recovered for the buildings destroyed shall be applied to the erection of such new building."

The lessee is made strangely enough to covenant for this, although the policies would be in the hands of the lessor; and the same covenant makes the lessee further covenant that the lessor shall only apply them as the rebuilding proceeds; and the covenant then declares that the clause thereinbefore set out in reference to insurance of buildings is to apply in every respect to such new buildings.

The draughtsman who prepared this lease appears to have shewn an utter disregard of the form given in the Act—scarcely one of the covenants being in the statutory form. He commences with a variation of no great importance, further than exhibiting his general disregard of its directions, in omitting to describe the parties either as lessor or lessee, or by their names; by omitting to adopt the short form as to taxes, he loses his right to charge some taxes; the covenant against sub-letting differs also materially from the statutory form.

It may be questionable whether in the shape the covenant to repair and keep up fences is to be found in this lease, the obligation of the covenantor is not confined to keeping the fences in repair. The inclination of my mind is, that the lessor cannot invoke the aid of the statute and treat them as separate covenants, to which the extended form would apply.

It may be very difficult to know where to draw the line if deviations of any kind are sanctioned. Found in an ordinary lease, the covenant could have no other interpretation than extending to the repairs and keeping up of the fences.

It is not, I think, material to consider the precise effect of the words here, because assuming the words "to repair" to have the extended meaning given in the statute, I think that by the well understood rule of construction of cognate covenants in the same instrument, the qualification against loss by fire to be found in the covenant to

leave the premises in repair must be extended to this covenant also.

The liability therefore of this defendant must depend on the construction to be placed on the covenant to build and rebuild, to which I have already referred.

After giving the matter much careful consideration, I am unable to agree with my brother Patterson in his interpretation of the statute, when he holds that the addition of the words "executors, administrators, and assigns," extends to all the covenants, whether those mentioned in the schedule or those which the parties have chosen to adopt in addition, where those covenants follow each other consecutively and the word lessee alone is used in the first of such covenants. With great deference, I find myself unable to adopt that conclusion.

Schedule B. of the Act provides that where the premises demised are freehold, the covenants from one to eight inclusive, shall be held to be made with and the proviso nine, to apply to the heirs and assigns of the lessor, and when of a leasehold tenure, to be made with and apply to the lessor, his executors, administrators, and assigns.

The interpretation thus to be given to the word lessor is confined to the covenants entered into with him and referred to in the schedule, and to no other.

There is no similar provision in reference to the lessee, but the interpretation is to be gathered from that portion of the enactment which declares that where any party to the lease employs in it any of the forms of words contained in column one of the schedule, and distinguished by any number therein, such deed shall be taken to have the same effect, and be construed as if such party had inserted the form of words contained in column two and distinguished by the same number. For example, where the words "to pay rent" are used, the more extended meaning given in column two is to be held to have been intended; and in the same manner where the word "lessee," is used, it shall be held to include executors, administrators, and assigns; but it is confined, I submit with much confidence, to those

covenants which are set forth in the schedule. In these cases the word "lessee" shall have a statutory meaning.

I do not for a moment doubt that at common law if the words, "the lessee, his executors, administrators, and assigns," were found at the commencement of the first covenant, they would extend to all the subsequent covenants, without any formal repetition of those words or of the covenant; but what I submit is, that the word lessee has no such meaning apart from the statute, and that its statutory meaning is confined strictly and designedly to those covenants to which an extended meaning is given by the statute, and to those alone.

The words of the statute are not "wherever in any covenant the word lessee is used as indicating a covenantor it shall be held to include his executors, administrators, and assigns," but wherever it is found in any of the covenants contained and numbered as in column one it shall bear a particular meaning. In the same way we find the only covenant by the lessor given in the statutory form is one for quiet enjoyment. And the word lessor used in that connection is interpreted to mean the lessor for himself, his heirs, executors, administrators, and assigns; but I confess myself at a loss to understand why that interpretation should be given to other covenants not referred to in the statute when the Legislature has not said so, and when for aught that appears the parties never intended that the words should bear any other than their ordinary meaning. And then we find the statute expressly providing that when any part of the deed fails to take effect by virtue of the Act, it shall nevertheless be as effectual to bind the parties so far as the rules of law and equity will permit as if the Act had not been made.

I am of opinion, therefore, that both as to the covenant to build and the covenants to insure and to re-build, they all stand on the same footing, and are confined to the lessee, who is the only party named in either of them, and the covenant not being within the cases to which the statutory extension applies.

The question is, therefore, narrowed in my opinion to the one point. Is this a covenant running with the land so as to make the assigns liable though not named?

It is laid down, and admits of no doubt, that where the covenant in a demise relates to a thing *in esse* parcel of the demise, the thing to be done by force of the covenant is annexed to the thing demised, and goes with the land, and binds the assignee though not bound by express words; and even though the covenant relate to a thing not *in esse* at the time of the demise, yet if it directly touches or concerns the thing demised, and the word *assigns* be contained in the covenant, they will be bound by or may take advantage of the covenant. This is clearly so at law, and I apprehend there is no difference in equity in this respect.

I can well understand a Court of Equity interfering by injunction to restrain parties purchasing with notice of covenants on the part of those through whom they claim, from using premises in a particular manner, and cases of that description, whether the covenants do or not run with the land; but the distinction is obvious between the enforcement of "an equity attached to the property," and compelling an assignee to perform a contract not entered into by himself nor on his behalf by the person through whom he acquired the land.

In the case we are now considering, if the question had arisen in an action against the assignee for not erecting the house which the lessee had covenanted to build, it is admitted on all hands that we must have held that he was not bound.

In *Sheppard's Touchstone* it is thus put (p. 180): "If the lessee covenant for himself, or for himself, his executors or administrators only, to build a new house upon the land, demised," the assignee is not bound, the editor adding, because he is not named. But in this case, it is said, the house, though not in existence at the time the covenant was entered into was subsequently built and became part of the thing demised, and it is urged that that being so the case is not dis-

tinguishable from *Minshull v. Oakes*, 2 H. & N. 809, where it was held that the assignee was liable on a covenant by the lessee to repair the messuage demised, and all other erections and buildings which should or might be thereafter erected, and the same being so repaired, the lessee, his executors, administrators, or assigns would yield up at the end of the term. There was a breach for not repairing and *not yielding up* in repair.

The third plea was pleaded as to a part of this, viz., as to so much as complained in respect of a corn mill, and shewed that it was built during the term, and not in place of others previously existing.

The Chief Baron in giving judgment, held that such a covenant ran with the land and bound an assignee, though not named, inasmuch as the covenant was not absolutely to do anything, but to do something conditionally, viz., if there are new buildings to repair them; as when built they would be part of the thing demised, and subsequently the covenant extended to its support; that as the covenant clearly bound the assignee as to things *in esse*, so also as to things *in posse*; that there was only one covenant to repair, and the assignee being clearly included as to part, must be intended to be included as to the whole. The reasons given for this judgment are not very satisfactory. If the covenant by the lessee had been to repair not only the buildings on the demised premises, but others upon another property of the lessor as part consideration for the lease, it would have been but one covenant to repair, part of which would bind the assignee and part not. The first reason, therefore, does not appear to be entitled to much weight. And the remaining reason appears to me to be equally fallacious, that the building when put up would be part of the thing demised, and therefore the covenant to support it would run with it. The answer is, that it was not part of the thing demised when the covenant was entered into; and although the covenant of the lessee might extend to its support, to carry the lien of that personal obligation over to the assignee, he must be expressly named.

This would, perhaps, be no reason for objecting to follow the decision, although when we find it standing alone, for it seems to receive support only from one case in a report of doubtful authority, while the other cases relied on, so far from countenancing the doctrine, are directly opposed to it, where the contrary rule has been adopted and acquiesced in for nearly three centuries, applied to numerous cases, and become a land mark as it were in the branch of law to which it relates, and people have entered into contracts upon the faith of its being the well understood law upon the subject, I think we should be careful at all events not to extend such a decision to any case not precisely similar in its circumstances.

The case itself has been treated as of doubtful authority by numerous writers. *Chitty* in his work on Contracts; *Roscoe* in his Treatise on Evidence, and the learned editors of *Smith's Leading Cases*, 6th ed., all so regard it. In that edition, at p. 59, they use these words in commenting upon it:

"Of the two other cases relied upon by the learned Barons in opposition to *Spencer's Case*, it may be sufficient to say with reference to *Smith and Arnold*, 3 Salk. 4, that the third volume of Salkeld has never been considered to be of any authority, and with reference to *Bally v. Wells*, 3 Wils. 25, that instead of its containing anything in derogation of *Spencer's Case*. the Court there said, in comparing it with the case in *Moore*, 'We rather choose to adhere to Lord Coke's authority that such a covenant will not bind the assignee unless he be named.' Having called attention to the state of the authorities it must be observed that the reasoning in *Minshull v. Oakes* does not appear to reduce any portion of the resolutions in *Spencer's Case* to an absurdity. With all submission, Lord Coke does give a reason for the alleged difference between where the assignee is and is not named in those cases in which the covenant relates to a thing not *in esse at the time of the contract*, for he explains in the first resolution, that where in these cases the assignee is not named the law cannot annex a covenant to a thing which has no being, and further Lord Coke does not give as a reason for binding in any case an assignee not named

that he takes the benefit and burthen of the contract. He gives indeed as one of the reasons for binding assignees who *are* named upon covenants relating to things not *in esse* at the time of the contract, that they take the benefit of it; but whether this be or be not a sufficient reason for holding that *named* assignees are liable in these cases it clearly cannot be a sufficient reason for holding that unnamed assignees are bound by such covenants if, as Lord Coke explains in the earlier resolution, the law cannot, the contract being silent, annex a covenant to a thing which has no being."

It is true that in a more recent edition of the work the present learned editors say that there is good reason in the decision, as there would seem to be no rational distinction between the position of an assignee named and not named, as to things not *in esse* at the time of the demise. I do not propose to discuss the soundness of their present criticism further than to contrast it with the previous note from which I have made so copious an extract, and to remark that that note had the approval of, if not penned by, no less distinguished a person than the late Mr. Justice Willes.

This decision though not binding upon this Court is entitled of course to great consideration, but we cannot follow it without disregarding the rule laid down by Coke and so long acquiesced in, for I am unable to follow my brother Patterson's reasoning and bring myself to the conclusion that this case does not come precisely within the first resolution in *Spencer's Case*, which resolves that the law cannot annex a covenant to a thing which has no being where the assignee is not named. That it was in being when the present defendant became assignee of the lease cannot have the effect of altering the effect of a covenant made years before with another party, although he might have made himself liable by express covenants to assume all the obligations under which his assignor had come with his lessor—an obligation which it is highly improbable that he as a mere mortgagee would have been willing to assume.

But the authority of that case is sufficiently doubtful to justify a Court in not carrying it beyond the actual decision, and extending it to a case in any way differing in its circumstances and this case does I think afford a distinction. It is quite true that under a covenant to repair a lessee is bound to rebuild, yet a covenant to repair and a covenant to re-build may not necessarily involve precisely the same obligations. Here the covenant to repair, which names the assigns, contains the exception of damage by fire; the covenant to rebuild, which in terms names the lessee only, contemplates a destruction of the building by fire, and a rebuilding, a building in other words *de novo*; the lessee and his assigns being equally bound to make all repairs except those caused by fire.

In *Martyn v. Clue*, 18 Q.B. 661, Erle, J., remarked during the argument: "To repair is not the same as to put in repair, which may require the building of something new. The ordinary covenant of repair is merely to maintain things *in esse* in the state they were in when the premises were demised;" and although the Court there held that the covenant, which referred only to premises then in existence, ran with the land, it is obvious that they would have taken a different view if the covenant had extended to any thing thereafter to be placed upon the demised premises.

We have not to consider whether the rule laid down in *Spencer's Case* was founded on good reason or not, or whether there is or should be any rational distinction between an assignee named or unnamed; and to adopt the language of C. B. Pollock in the case cited: "It would not be enough to justify a departure from it, that it was without a known reason; it ought to be followed, at least unless repugnant and contrary to other rules and principles."

The question is not whether the building was a thing *in esse* at the time of the assignment, but at the time the covenant was entered into; if it was not *in esse* at that time, the law could not annex the covenant to a thing which had no being.

The law has since the time of Coke been so understood, and ought not upon slight grounds to be broken in upon.

The assignee in the present case is mortgagee of the premises, and it is to be assumed that before taking an assignment as security, he would examine the lease; he would there find that he, as assignee, was bound to repair, but he would also find an exception against fire in that covenant. He would also find a covenant to build in which the assignee is not named, and he might, not unreasonably, I think, upon the authorities, have assumed that those covenants did not extend to him. The covenant was in reference to a thing not then in existence—the house thereafter to be erected. It did not extend to the support of the thing demised, for a house not then in existence could not form part of the thing demised; and although the parties might by the use of proper words have extended the covenant to the assigns, the liability of this defendant is to be regulated by what they have done, not by what they might have done.

In *Tatem v. Chaplin*, 2 H. Bl. 133, the covenant was clearly within the rule in *Spencer's Case* as annexed and appurtenant to the thing demised, and therefore binding on the assigns though not named.

In such a case the covenant relating specially to the enjoyment of the thing demised, the assignee is necessarily bound. In others it is competent to the contracting parties to make the covenant personal or to extend it to the assignee. When, therefore, the covenantor names his assigns, it evinces an intent to bind the land, and the obligation becomes connected with the estate.

I am of opinion, therefore, that the assignee in this case was not bound under the covenant to rebuild. Such a construction enables us to give a sensible effect to the whole of the covenants in this lease; the other would lead to this manifest contradiction, that whilst under the covenant to repair the assignee would not be bound to rebuild in case of fire, under another covenant he would be so liable. We must gather the intention of the parties from

the whole instrument, and we there find that the lessor has been satisfied with a personal covenant from the lessee in reference to the erection of the building, and to its being again rebuilt in the event of its destruction by fire, and that he has required the assignee to come under obligation to repair, but exempted him from the risk of fire.

If he had desired to bind the assignee to build or rebuild the house contemplated in the covenant to that effect he might easily have done so, and not finding it there the reasonable conclusion to draw is that he did not so intend.

I have referred to the cases cited by Mr. McClive, but they do not touch this question. *Cornish v. Cleiffe*, 3 H. & C. 446, turned upon the construction to be given to a particular covenant, the Court holding that a covenant to keep in repair was confined in terms to an existing dwelling house, and did not extend to buildings to be erected.

In *West v. Dobb*, L. R. 4 Q. B. 637, Blackburn, J., took occasion to explain the judgment in *Williams v. Earle*, L. R. 3 Q. B. 739, stating that all that was meant to be decided in that case was that the covenant bound the assignee—assigns being named. It was a remark made merely during the argument; but it is difficult to suggest a covenant more obviously touching the thing demised, and to which the distinction about a thing not *in esse* at the time of the demise was more manifestly inapplicable than the covenant in *Williams v. Earle*. It is sufficient to say, however, that in that case assigns were named, and in *West v. Dobb* it became unnecessary to decide the point whether the covenant was a personal restriction or a covenant running with the land.

I think, therefore, that the appeal should be allowed, and the bill dismissed, with costs.

I have mentioned that I have been unable to find any reference to *Minshull v. Oakes* in any subsequent case, nor did I find any criticism upon the judgment any where except in the notes to *Spencer's Case* in *Smith's Leading Cases* until after I had prepared this judgment. I have since read a very able article in the *Law Times*, vol. 67, p. 76,

which thus refers to this question: "Then there is the distinction between the inherent and the *quasi* inherent covenants; those which touch the thing demised and those which touch something not *in esse* at the time of the demise, but which will be parcel of the demise when it comes into being. As to the latter, which bind the assign only when named, the distinction between them and the former class does not very obviously commend itself to the reason. It is open to a double objection. In the first place, it is difficult to see any reason why the latter kind should be any more restricted than the former; in the second place, supposing that some restriction is to be imposed, it is still more difficult to see why a named assign should be bound when an unnamed assign is not bound. But the distinction must be regarded as well settled, though the ambiguity which surrounds the whole subject, makes it of very little use as a practical guide. This is well illustrated by *Minshull v. Oakes*, 2 H. & N. 793. There the Court of Exchequer not only expressed their opinion that the distinction in question was unreasonable, but went so far as to impugn Lord Coke's report, setting up against it a brief notice of an anonymous case in Moore, which they erroneously fancied to be the same with *Spencer's Case*. But it is obvious on examination that the two cases are not the same; and even if they were, it would be absurd to pit the authority of a few hurried lines in Moore against Lord Coke's evidently elaborated account; and lastly, to crown the matter, the Court did not venture to act upon their mistaken discovery, but preferred by a great display of ingenuity to remove the case from the class of *quasi* inherent into that of inherent covenants. Thus they made the distinction more clear than ever as a matter of law, and more obscure than ever as a matter of fact."

PATTERSON, J. A.—The facts out of which this contest has arisen lie within a small compass, but the questions involved are of some nicety.

Emmett, the plaintiff, made a lease to Robinson of a piece of land on which there were fences but no buildings. The lease bore date 21st September, 1874, and was for a term of twenty years from that date, at a rental of \$75 a year for the first ten years, and \$100 a year for the other ten. I shall have to refer particularly to the covenants: in the meantime I merely note that the contest turns upon

one or more of them relating to building upon the land. The lessee, Robinson, in October, 1874, assigned the term to one Meadows, who built a dwelling house as required by the lease. That house was burnt down, and in June, 1876, was rebuilt by Meadows. Unfortunately, however, the second house was also burnt, in August, 1879. One of the questions is the effect of the covenants, whether they are satisfied by one rebuilding or require the house to be rebuilt a second time. Another question is, the liability of this defendant upon the covenants. The defendant is assignee of Meadows, and was, when the second fire occurred, mortgagee in possession. The statement is, that in June, 1875, Meadows mortgaged the term to the defendant: that in December 1877, the defendant, under a power of sale in the mortgage, sold the term to one Nicholson, who bought for and on behalf of the defendant, and a few days afterwards, with the assent of the plaintiff, assigned the term to the defendant, who went into immediate possession. There are one or two other facts set out which do not strike me as at all material. These are that the defendant had insured the building, and received \$900 insurance money; a circumstance with which the plaintiff has no concern: that on the 22nd September, 1879, the plaintiff gave notice to the defendant to rebuild: that on the 1st October, 1879, the defendant assigned the term to one Green, a man of no means, for the express purpose of getting rid of the covenants in the lease so far as the same could be done; a step which would clearly have the effect he desired, both in the view of Courts of Law and Courts of Equity, so far as subsequent breaches were concerned: *Valliant v. Dodomede*, 2 Atk. 546; *Lekeux v. Nash*, 2 Str. 1221; *Taylor v. Shum*, 1 B. & P. 21; *Paul v. Nurse*, 8 B. & C. 486; *Onslow v. Corrie*, 2 Madd. 330; though it would leave him liable for any breach that had already occurred: *Harley v. King*, 2 C. M. & R. 18; *Rowe v. Street*, 8 C. P. 217; *Cuthbert v. Street*, 9 C. P. 386: and that the assignment was without the consent of the plaintiff, whereby the lease became for-

feited; and the plaintiff entered by reason of the forfeiture, and is now and has been since 1st April, 1880, in possession.

The lease is one of those specimens of careless or unskilful conveyancing which give so much trouble to Courts, and occasion so much vexation and expense to suitors.

It is stated to be made in pursuance of the Act respecting Short Forms of Leases; but it does not pursue the Act. The only instances in which the words of the Act have been literally followed, are the covenant to pay rent and the proviso for re-entry. Some of the variations are trifling, but that cannot be said of them all. What is important at present is, that the statute has not been followed in the covenant to repair. There is in this lease a covenant "to repair and keep up fences," where the statutory form gives two covenants, viz., "to repair;" and "to keep up fences." By the first section of the Act, if the deed contained any of the forms of words contained in column one of schedule B, and distinguished by any number therein, it should be taken to have the same effect and be construed as if it contained the form of words contained in column two and distinguished by the same number. It would only be by the aid of this provision that either the covenant to repair or the covenant to keep up fences could be construed so as to apply to the buildings or fences on the demised premises, or to define the duty intended to be assumed. The extended form of the covenant to keep up fences happens not to contain the word "repair," and the draftsman who penned this lease may have considered it a desirable word to insert under the power given in the schedule to introduce or annex any express qualification of the forms in the first column. At all events he has unmistakably attached it to the covenant about fences; and it would be an act of legislation, and not of construction, to read in this lease the effect of the covenant to repair which is contained in the second column, without finding in it the form of words contained in column one: See *Lee v. Lorsch*, 37 U. C. R. 262.

I am disposed to think, however, that the covenant would not have aided the plaintiff, even if it had been correctly framed. He requires to resort to it only in case the special covenants respecting rebuilding, to which I have yet to refer, do not reach far enough. Thus, if they are held to extend only to one rebuilding, he would like to insist on the statutory covenant which, in its extended form, demands repairs "when and so often as need shall be;" and if the special covenants do not bind the assigns of the lessee, he would find it useful to fall back on one which has no such defect. But, if this covenant were available, there would be the serious question whether it is not subject to the exception of damage by fire. No such exception, it is true, is expressed; but it is found in the other covenant to leave the premises in good repair. The question would be, whether, these being cognate covenants, and in *pari materia*, they are not both qualified by the exception; or, perhaps, whether they are not in reality two parts of one covenant. In all the precedents I find in books of conveyancing of the usual covenants for insertion in leases, the two, or rather these two and the other, which in the short form is, "that the lessor may enter and view state of repair, and that the lessee will repair according to notice," are in immediate connection, and are in fact one covenant; and where a form is given for the insertion of the exception of damage by fire, it is for insertion only once, viz, at the end. I have seen one precedent which may be perhaps an exception to this. It is given by *Crabbe* as concise covenants for a lease, and consists of the covenants in the extended form and in the same order as contained in column two of the Act 8 & 9 Vict. ch. 124, which was the model for our Act which is now called the Act respecting Short Forms of Leases. In the English Act, the covenants are separated, as in ours, by the interposition of others, some of which are on different subjects, and one of which is a covenant to insure and expend the insurance money in rebuilding, which

ours does not contain. I have no idea that in providing a short form in place of the very long one before in use, there was any intention to alter the nature of the covenants usual up to that time, or that the change, which was not in the order of the covenants, but in their immediate sequence, was supposed to have any such effect. But, reading them as they stand, we are, in my opinion, not only justified by authority, but required by sound principles of construction, to treat the exception of damage by fire as applying to the covenant to repair as well as to the other to which it is more directly annexed.

The subject of the effect on one covenant of restrictive words contained in another is discussed in *Sugden* on Vendors, *Dart* on Vendors, *Platt* on Covenants, and other treatises, chiefly, however, with relation to covenants for title. The most convenient and concise summary of it which I have seen is in a note in *Rawle* on Covenants, 4th ed., p. 498, a glance at which will save a detailed reference to the other books. In the text are given four propositions, which Lord St. Leonards considered deducible from the authorities; the first of which is, that when restrictive words are inserted in the first of several covenants having the same object, they will be construed as extending to all the covenants, although they are distinct; and the second, that when the first covenant is general, a subsequent limited covenant will not restrain the generality of the preceding covenant, unless an express intention to do so appear, or the covenants be inconsistent. Then the note, after referring to *Platt* on Covenants, proceeds thus: "Mr. Dart, in quoting the above classification of *Sugden*, observes: 'of the above propositions, the first, if read in connection with the above classification of the covenants and of their separate objects, seems to be warranted by the authorities; the second proposition (which together, or rather as connected with the first, has been disputed in *Sweet's* edition of *Jarman* on Conveyancing, vol. ix., p. 383,) is perhaps, hardly accurate; for although a prior general covenant

will not, it appears, be restrained by a subsequent limited covenant having a different object, yet where two covenants relate to the same object, restrictive words in the second may, it seems, control the generality of the first.'

* * Some of the authorities, however, do not appear to take any distinction between cases where a general or unlimited covenant *precedes* a special or limited one, and where it *follows* it; in other words, the mere priority of position in the conveyance of one over the other seems very often to be thought a matter of little or no moment."

The case of *Iggulden v. May*, 9 Ves. 325, is then cited, where it was said the exposition must be both *ex antecedentibus et ex consequentibus*; and a note of Sergeant Williams quoted, which will be found at p. 83 of the last edition of *Wms. Saund.*, vol. 1; and also a saying of Dallas, C. J., in *Foord v. Wilson*, 8 Taunt. 543, that "The order in which the covenants stand, however transposed, is comparatively unimportant."

There would, in my judgment, be a manifest inconsistency between a covenant to deliver up premises in good repair, damage by fire excepted, and one to repair when and so often as need should be, without any such exception.

I think, therefore, that the statutory covenant to repair must be held to be qualified by the exception of damage by fire contained in the covenant to leave the premises in good repair. I do not see that the insertion in the same lease of an express covenant to rebuild in case of destruction by fire can be regarded as such a qualification of those covenants as *in form* to expunge the exception from them. The express covenant will, of course, have whatever force properly belongs to it; but when we talk of its qualifying the statutory covenants, we must not lose sight of the provisions of the statute itself. These are (sched. B. 3) "parties may introduce into or annex to any of the forms in the first column, *any express exceptions* from or express qualifications thereof respectively, and the like exceptions or qualifications shall be taken to be made from or in the

corresponding forms in the second column." What the statute is dealing with is not the effect which one provision may have in modifying the force of another as a matter of construction, but the *form* or wording of the covenants themselves. In this view it provides for the introduction of express words creating an exception or qualification into the extended form, if such words are introduced into the short form. The added covenants, whatever their effect may otherwise be, do not constitute the kind of express exception or qualification thus dealt with. They must therefore, in my opinion, be read by themselves, leaving the statutory forms to be read in the words of the second column. This will not prevent the added covenants operating to render nugatory the exception against damage by fire, if that should be their proper effect. It probably would be their effect *quoad* the lessee himself, and every one else who was bound equally by both sets of covenants; but if the special covenants happen not to bind the assigns of the lessee, who are bound by the statutory ones, the distinction which keeps each set by itself will prove a substantial and not a merely formal one. If the assigns are bound by these special covenants, the plaintiff does not need the assistance of the others, unless the former fail to provide for more than one rebuilding. If he is driven to resort to them he is met, according to my view of the matter, by the exception of damage by fire.

For these reasons, while I retain the opinion that we cannot treat this lease as containing the statutory covenant to repair, I am inclined to think that its presence would not have strengthened the plaintiff's case.

I proceed therefore to consider the special covenants.

The words, introductory to all the covenants, are "and the said party of the second part covenants with the said party of the first part;" then follow the covenants which represent the statutory ones, down to that to leave the premises in good repair; and then the special ones, in these words: [His Lordship here read the covenants above numbered 2, 3, 4, 5.]

I see no reason to doubt the correctness of the opinion of the learned Vice Chancellor that, under the last covenant, the buildings were to be replaced as often as burned during the term. Although a very literal reading might fail to find words expressly saying so, yet nothing is said to the contrary. The language is sufficiently applicable to the asserted obligation; and, in the events which have happened, it would be impossible for the lessee to perform the next preceding covenant, by insuring during the last ten years of the term, if he had no building there to insure. There are cases in which impossibility of performance, by reason of the destruction of the subject of a contract, affords an excuse for non-performance; but, in this instance, reading the whole contract together, it is, I think, clear enough that the agreement was, that the lessor should have at the end of the term a building, or if burnt too near the end of the term to be capable of rebuilding in time, then perhaps only the insurance money; but certainly one or the other: See *Nouaille v. Flight*, 7 Beav. 521; *Hodson v. Williams*, 39 L. T. N. S. 632.

The main question is, the liability of the defendant as an assignee. The original lessee of course remains liable on his contract.

First, are the assigns named in the covenant by virtue of the statute, as they are not named in the document itself?

The statute provides (schedule B 4) that, where the premises demised are freehold, the covenants 1 to 8 shall be taken to be made with, and the proviso 9 to apply to the heirs and assigns of *the lessor*, and when leasehold, to the *lessor*, his executors, administrators and assigns.

There is no such general provision touching the *lessee*, and that just quoted would not apply to an added covenant, being expressly confined to those enumerated. It is only in the form of the first covenant we have the word *lessee* extended to the representatives or assigns. The covenant in column one is, "1. That the said *lessee* covenants with the said *lessor* to pay rent;" and this, by column

two, means "1. And the said lessee doth hereby for himself, his heirs, executors, administrators, and assigns, covenant with the said lessor that he," &c. This, without repetition in any other covenant, is carried in its effect through them all. I take it that if, instead of the short form of column one, the extended form of column two were used throughout, the effect at common law would be the same, and the covenants would be all read as one, at least for the purpose of regarding each of them as expressed to be made by the lessee for himself, his heirs, executors, administrators, and assigns. And, further, inasmuch as we should see upon the face of the lease, through the magnifying medium of the statute, the extended form of words, the same effect would run on, just as if those words were written out in full, into any added covenants, so long, at all events, as the same grammatical structure was adhered to.

Thus the first of these special covenants, namely, that one by which the lessee undertakes to build a house and other buildings, and to leave those buildings and all buildings and fences erected by him on the premises, thereon; and that they should be the property of the lessor, would properly be read as expressly binding assigns as well as the lessee himself. I attach no importance to the substitution of the words "party of the first part," and "party of the second part," for the words "lessor" and "lessee" given in the forms. It is true the statute (sched. B. 1) merely says that any *name* or *names* may be substituted for the words "lessor" and "lessee;" but I do not think we should give this so narrow a construction as to confine it to proper names, or refuse to consider it as covering so usual a description of the parties as that here employed—particularly as the same description is used in the form of lease given in schedule A.

But the plaintiff, or his conveyancer, if it was really the intention to bind the assigns of the lessee by the covenants to insure and to rebuild, has created the difficulty by altering the form, and beginning, as it were, a new series of

covenants, with the words, "And the said party of the second part further covenants with the said party of the first part,"—words which in this place take no extended meaning from the statute, while they break the connection which so far had carried down the extended meaning. I confess I am unable to find any satisfactory reason for making the words say more than is conveyed by their ordinary signification, or for holding that the assigns are named in these later covenants.

This reduces the inquiry to one point: Is this covenant to rebuild one which, under the circumstances, can be held to run with the land, so as to be obligatory, either at law or in equity, upon assigns who are not named in it?

I have come to the conclusion, after much consideration, that we ought to hold that it does bind the assigns of the lessee.

On all questions concerning covenants running with the land we resort to the resolutions in *Spencer's Case*, 5 Co. 16, as the ultimate authority. That case, it will be recollected, was an action of covenant against an assignee of a lessee, upon an indenture by which the lessee had for him, his executors and administrators, covenanted with the plaintiffs that he, his executors or assigns, should build a wall upon part of the land demised. The first, second, and sixth resolutions are those which concern us at present: They read as follows:—

"1. When the covenant extends to a thing *in esse*, parcel of the demise, the thing to be done by force of the covenant is *quodammodo* annexed and appurtenant to the thing demised, and shall go with the land, and shall bind the assignee, although he be not bound by express words; but when the covenant extends to a thing which is not in being at the time of the demise made, it cannot be appurtenant or annexed to the thing which hath no being; as if the lessee covenants to repair the houses demised to him during the term, that is parcel of the contract, and extends to the support of the thing demised, and therefore is *quodammodo* annexed appurtenant to houses, and shall bind the assignee, although he be not expressly bound by the covenant: but in the case at bar, the covenant concerns a thing which was not *in esse* at the time of the demise made, but to be newly built after, and therefore shall bind the

covenantor, his executors or administrators, and not the assignee, for the law will not annex the covenant to a thing which hath no being."

"2. It was resolved that in this case, if the lessee had covenanted for him *and his assigns*, that they would make a new wall upon some part of the thing demised, that forasmuch as it is to be done upon the land demised, that it should bind the assignee; for although the covenant doth extend to a thing to be newly made, yet it is to be made upon the thing demised, and the assignee is to take the benefit of it, and therefore it shall bind the assignee *by express words*.

"6. If lessee for years covenants to repair the houses during the term, it shall bind all others as a thing appurtenant, and goeth with the lands into whose hands soever the term shall come, as well those who come in by act in law, as by the act of the party, for all is one having regard to the lessor. And if the law should not be such, great prejudice might accrue to him; and reason requires that they who shall take the benefit of such covenant when the lessor makes it with the lessee, should, on the other side be bound by the like covenant when the lessee makes it with the lessor."

I have passed over part of the second resolution which treats of covenants to do things merely collateral to the land, which do not bind the assignee even if named.

In the present case, if the house had never been built, *and if* the covenant to build resembled the covenant to rebuild, in omitting to name the assigns, the first resolution as well as the actual adjudication in *Spencer's Case*, would have been directly opposed to the defendant's liability upon the covenant; and, however difficult one might find it to appreciate the grounds of the distinction between a covenant relating to a thing *in esse* and one not *in esse* at the time of the demise, or to understand why the arguments in the second resolution should not apply with equal force when the assigns were not named as when they were named, the authority would be conclusive.

Here the house had been built before the defendant acquired the term; it had become part of the thing demised; it was, as a thing *in esse*, the subject of the covenants, (except the one as to building it, which had been performed) just as it would have been if it had been there when the lease was made; the defendant had taken the benefit of it, not merely by way of legal title, but with distinct appreciation of his ownership, as shewn by his

insuring it. If there had been a house on the place when the lease was made, no one supposes that a covenant to repair or rebuild would not have bound the unnamed assignee to repair or rebuild any house that had taken the place of the original one. If he is not bound in this case, he must owe his escape to some positive rule which we are not at liberty to disregard, even though we do not know the reason of it. What "reason requires," as it is put in the sixth resolution, so that prejudice shall not accrue to the lessor, would seem to be the same in the one case as in the other.

There are considerations of convenience in favour of holding such a covenant to run with the land. The ordinary covenant to repair and to yield up in good repair, extends in its terms, to buildings which at any time during the term shall be upon the land, as well as to those which are there at the time of the demise; and the repair it calls for includes rebuilding after a fire: *Bullock v. Dommitt*, 6 T. R. 650. If the two sets of buildings were subject to different rules, it might be sometimes embarrassing to determine to what extent the covenant bound the assignee and how far it left him free. The question would be pertinent which was asked by Parke, B., in *Doughty v. Bowman*, 11 Q. B. 444, "Can part of the same covenant run with the land and part not?"

Doughty v. Bowman, is the only case I have seen in which the question of the liability of the assignee upon a covenant to build, when the assignee was not named and the building was not erected, was directly raised. The action was brought by a sub-lessee against the assignee of his immediate landlord upon a covenant that the landlord, his heirs, executors, or administrators, not naming assigns, would perform the covenants in the principal lease, and indemnify the plaintiff from them. One of those covenants bound the principal lessee and his assigns to build upon the demised premises. He had not done so, and he had assigned his reversionary interest in the term to the defendants. The lessor had entered by reason of

the breach and evicted the plaintiff. The declaration charged that the lessee had covenanted with the sub-lessee to build the houses, and also to indemnify him. It was held first in the Queen's Bench, and afterwards in the Exchequer Chamber, that if the covenant was to be regarded as a covenant to build, it related to things not *in esse*, and so did not bind the unnamed assignee; and if it were a covenant to indemnify only, it was merely collateral.

The case of *Minshull v. Oakes*, 2 H. & N. 793, presented facts more analogous to those before us. The lessee there had put up the buildings he covenanted to erect, and the action was against his assignee upon the ordinary covenant to repair, which did not profess to bind the assigns. The complaint was for nonrepair of a building not *in esse* when the lease was made, but built afterwards by the lessee. The decision was, that the assignee was liable. In the judgment of the Court, delivered by Pollock, C. B., a doubt was suggested whether the resolution in question was correctly reported by Coke, principally on the ground that in an anonymous case in *Moore* 159, which was assumed to be *Spencer's Case*, and in *Smith v. Arnold*, 3 Salk. 4, the law was stated the other way. In the edition of *Smith's Leading Cases*, issued after *Minshull v. Oakes* was decided, some doubt was thrown on the soundness of the decision, and an interesting historical argument was employed to shew that the idea that the case in *Moore* was *Spencer's Case* was erroneous. In the later editions of the work the note of the editors appears to have been re-written, not varying materially the remarks on the historical controversy, but adding a well-considered reference to the question really decided, which it will be worth while to extract in place of quoting from the judgment itself. I quote from the 8th ed., p. 84:

"Whatever be the state of previous authorities, the remarks of the Court of Exchequer would seem to be based on sound reason, as, except the arbitrary rule that the law will not annex a covenant to a thing not *in esse*, there seems to be no rational distinction between the position of

an assignee named and not named, as to things not *in esse* at the time of the demise. As to the benefit or burthen of such a covenant, they would both be in exactly the same position, and if this is a ground, as it is said to be, for holding a named assignee liable, it is also a ground for holding liable one not named. Moreover, the covenant may well be said to be annexed, not to the thing not *in esse*, but to the land itself upon which the thing is to be made or done, and in respect of which, and not of the thing not *in esse*, there is the privity of estate which is the foundation of the running of covenants.

"In *Minshull v Oakes*, the Court did not in terms overrule *Spencer's Case*, but suggested a distinction, holding that a covenant to repair the messuage, and all other erections and buildings which should or might be erected during the term, ran with the land, and bound an assignee, though not named, inasmuch as the covenant was not absolutely to do a new thing, but to do something conditionally, viz., if there were new buildings, to repair them; and that when built they would be part of the thing demised, and consequently the covenant extended to its support; that as the covenant clearly bound the assignee to things *in esse*, so also as to things *in posse*; that there was only one covenant to repair, and the assignee being clearly included as to part, must be taken to be included as to the whole."

The circumstance that the building was upon the land, and, as a thing *in esse*, the subject of the lessee's covenant at the time of the assignment to the defendant, brings this case, I think, within the terms of the first part of the first resolution; and I think also that there is nothing in the second part of that resolution which need occasion any difficulty in so holding. We should read the resolution in connection with the illustrations which are given. There are two illustrations given—one of each proposition. The first, which explains the force of the first proposition, is that of a covenant to repair houses demised; and that, it is said, extends to the support of the thing demised, and binds the assignee, though not named: the second proposition is illustrated by a reference to the case at bar, namely, the covenant to build, which it was sought to enforce against the assignee. Thus, taking the proposition and the illustration together, we perceive that it was merely intended to formulate the effect of the adjudication in that case; that is to say, that the assignee not named was not chargeable upon a covenant to build *de novo*, as it is called in *Cockson v. Cock*, Cro. Jac. 125,

where such a covenant was said to be collateral. It is amplifying 'Coke's formula to say that when once the building has been erected the assignee shall not be liable upon a covenant to insure or repair or rebuild it.

But there is another aspect of this case which distinguishes it from any of those in which the procrustean task has been undertaken to fit ever varying circumstances into a set of rigid rules.

As I have already pointed out, the covenant to build the house is expressed to be made by the lessee for himself, his heirs, executors, administrators, and assigns, that being in my judgment the statutory effect which had descended without interruption through the series of covenants till this one was reached. We have therefore a covenant to build which bound the assigns, and under which this defendant could have been compelled to put up the dwelling house if that had not been done by his predecessor in title. Therefore when he disputes his liability to rebuild he takes a position for which he can find no precedent.

These two points which, for the reasons I have given, I think should be found for the plaintiff—viz., that the covenant runs with the land, and that it is not exhausted by once rebuilding—are decisive of the whole case. But I have thought it right to examine the other questions discussed before us, because they were to some extent dwelt upon in the Court below; and because, as questions under our conveyancing statutes are likely to arise from time to time, it seemed proper to indicate my views of the bearing upon this case of those which have been raised.

I am of opinion that the appeal should be dismissed, with costs.

SPRAGGE, C. J.—I have heard this case for the first time upon the re-argument; a second argument having become necessary from the circumstance of my learned brothers, who now with myself compose the Court, being unable to agree as to what ought to have been the decree in the case.

My brothers Burton and Patterson have given their reasons at length for the conclusions at which they have respectively arrived.

Up to a certain point my learned brothers agree, as to the construction to be placed upon the ill-drawn instrument out of which has arisen the litigation between the parties to this suit. And as I agree with their construction of the instrument up to that point, I do not propose to do more than to state my views upon points upon which they do not agree.

They both agree, and I concur in their opinion, that the decree made in the Court below can only be supported in case the covenants to rebuild and to leave the premises "with the appurtenances," are covenants running with the land.

There is, however, one point upon which my learned brothers differ before coming to that question. It is upon the covenant by the lessee to build, and at the end or sooner determination of the term to leave the buildings and all buildings erected by him, upon the premises. This covenant follows next after the covenant which is, I suppose, intended to embody the statutory covenants, and which commences with the words, "and the said party of the second part covenants with the said party of the first part." These words without the extended meaning given to them by the statute, would of course import only a personal covenant. After this intended statutory covenant, the covenant following commences with "and also that he will erect," &c., and that following covenant is not a statutory covenant; and the question is, whether the extended meaning given to the short form of words prefatory to statutory covenants, applies to other covenants. There is nothing in the statute to give the extended meaning to any other than statutory covenants; and the language used does not import such extended meaning. My brother Burton has given his reasons at greater length for holding this covenant a covenant not extending beyond the parties to it. I need only add therefore that I concur in them.

The larger question, whether the subsequent covenants,

to rebuild in the event of fire, and to repair, are covenants running with the land, is governed by *Spencer's Case*, which continues to be the standard of authority to the present day.

If the question were *res integra*, and the statute of Henry VIII now to be interpreted I should feel constrained to construe this covenant as a covenant running with the land. By the common law, as the statute of Henry recites, no stranger to any covenant could take advantage thereof; but only such as were parties or privies thereunto; and this the statute professed to remedy, by giving to all persons and bodies politic, their heirs, successors, and assigns, the like advantage against the lessees their executors, administrators, and assigns, by entry for non-payment of rent, or for doing waste or other forfeiture, and by action only for not performing other conditions covenants, or agreements expressed in the indentures of leases and grants, against the said lessees and grantees, their executors, administrators, and assignees, as the said lessors and grantors, their heirs or successors might have had;" words as comprehensive as could well be used.

We are, however, bound by the resolutions in *Spencer's Case*; and, while we may venture to think that a covenant to build a house upon land is a covenant concerning a thing *in esse* and appurtenant to the land demised, inasmuch as the land itself is a thing *in esse*, differing in that respect from a covenant to build upon other land, the first resolution puts a more restricted meaning upon the language used. And so the second resolution gives effect as against assignees to a covenant to build upon land demised, only where the lessee covenants for himself and his assigns, and then by reason of the "express words," although the reason given in the resolution for charging the assignee upon the covenant is perfect without it; viz., "that forasmuch as it is to be done upon the land demised that it should bind the assignee; for although the covenant doth extend to a thing to be newly made, yet it is to be made upon the thing demised, and the assignee is to take the benefit

of it, and therefore shall bind the assignee." The resolution adds, "by express words," the reason being, as I cannot but think, perfect, without the added words. The sixth resolution, which relates to covenants to repair, requires no reference to assigns, but binds them without it; and gives this satisfactory reason: "And if the law should not be such, great prejudice might accrue to him; and reason requires that they who shall take benefit of such covenant when the lessor makes it with the lessee, should on the other side be bound by the like covenant, when the lessee makes it with the lessor."

The observations of Messrs. Collins and Arbuthnot, the learned annotators of the 8th edition of *Smith's Leading Cases*, in reference to *Minshull v. Oakes*, 2 H. & N. 793, and the resolutions in *Spencer's Case*, commend themselves to one's judgment for their good sense, and the clear and pithy manner in which they state the question. These observations are quoted in the judgment of my brother Patterson, and I need not repeat them.

In *Minshull v. Oakes*, Chief Baron Pollock, while evidently not subscribing to the reasons upon which the first resolution in *Spencer's Case* proceeds, yet observed that "if the law were clearly laid down without contradiction, it ought to be abided by, though no reason could be given for it. It would not be enough to justify a departure from it that it was without a known reason; it ought to be followed at least unless contrary and repugnant to other rules and principles." I think the learned editors of the 6th edition of *Smith's Leading Cases* shew that the learned Chief Baron could not be right in assuming the case in *Moore* to which he refers to be the same as *Spencer's Case*.

Minshull v. Oakes was decided upon a distinction from *Spencer's Case*, that the covenant to be construed was not a covenant absolutely to do a new thing; but to repair buildings already erected on the demised premises, and any other buildings that might be erected thereon, the learned Chief Baron putting it, that as the

covenant "clearly binds the assignee to repair things *in esse* at the time of the lease, so does it also those *in posse*, and consequently the assignee is bound. There is only one covenant to repair; if the assignee is bound as to part, why not as to all?"

My brother Patterson puts his judgment upon two grounds. One, the fact that the building was upon the land at the time of the assignment to the defendant, though not at the date of the lease; the other, that the covenant to build in terms extended to assignees. I have already expressed my dissent from that construction of the covenant to build; then as to the other ground, my learned brother says it is amplifying Sir Edward Coke's formula to say that when once the building has been erected the assignee shall not be liable upon a covenant to insure, or repair, or rebuild it. I should be very glad if I could come to the same conclusion upon this point. But unless the covenant to build binds assignees, which I think it does not, the reasoning upon which the decision in *Minshull v. Oakes* was reached, does not apply, and we are thrown back upon the first resolution in *Spencer's Case*, that the covenant is concerning a thing not *in esse* at the time of the demise made.

I am unable to agree with the position of my learned brother, that the covenant may be read as taking effect at the date of the assignment to the defendant, or as being to be construed by the state of circumstances existing at that date. I can find no warrant for so construing the covenant. The covenant was made on the 21st September, 1874; the assignment to the defendant by way of mortgage, the plaintiff assenting, was in June, 1875; the first fire and the rebuilding were both in 1876, and the assignment to the defendant, the rebuilt house then standing, and the plaintiff assenting to the assignment, was in December, 1877; so that if the covenant could be construed as of that date, it would seem that it would bind the assignee. The plaintiff had the covenants of the lessee. His covenants, outside of the statutory ones, did not when made, operate beyond his own acts. If he had assigned before

building, or after the fire before rebuilding, the assignee would not be bound. He would not, because, according to *Spencer's Case*, the covenant was concerning a thing not *in esse*, and he was not named. He himself and his personal representatives would be bound, but not the assignee. What was there to give it an effect afterwards which it had not at the time that it was made? Could it receive one construction at the time that it was made, and another by reason of change of circumstances at a subsequent date. It is all the time the one, the same covenant. If a covenant of a nature not running with the land when made, did it become of a different nature and subject to a different construction afterwards; and how can we get over the plain meaning of the words in *Spencer's Case*, "But in the case at bar, the covenant concerns a thing which was not *in esse* at the time of the demise made, but to be newly built after." These difficulties did not exist in *Minshull v. Oakes*.

It is not without regret that I feel myself compelled to come to the conclusion that the plaintiff has no remedy against this defendant, upon the lessee's covenant. But I hold that we are bound to apply settled rules of law to all cases as they arise that fall fairly within the principles upon which these rules of law rest, although the circumstances may vary from those existing in the case in which those rules of law may have been settled.

I cannot conclude without observing upon the loose carelessness as well as unskilfulness of the person by whom the lease in question was drawn. Those who take upon themselves to practise as conveyancers should make themselves acquainted at least with the elementary principles and rules involved in that branch of the law, and not through either ignorance or carelessness leave those who employ them to suffer loss; and they would do well also for their own sakes to remember the liability they themselves incur, if through their negligence or unskilfulness those who employ them suffer loss. Cases upon this point have come up frequently before the Courts. One of the latest is the case of the *Hamilton Provident & Loan Co.*

v. *Bell*, reported in the 29th Vol. of Mr Grant's Chancery Reports, at p. 203.

In my opinion the appeal must be allowed, and with costs.

MORRISON, J. A. concurred with Spragge, C. J., and Burton, J. A.

JELLETT V. ANDERSON ET AL.

Disturbance of ferry—Construction of license to ferry.

Crown granted a license to the town of Belleville, giving the right to ferry "between the town of Belleville to Ameliasburg," sufficient to warrant the Court in assuming that between the one place and the other was meant.

Under the authority of this license the town of Belleville executed a lease to the plaintiff, granting the franchise "to ferry to and from the town of Belleville to Ameliasburg," a township having a water frontage of about ten or twelve miles, directly opposite to Belleville, such lease providing for only one landing place on each side.

The court, [affirming the decree of the Court of Chancery (27 Gr. 411)], that this was a sufficient grant to the licensee of a right of ferriage to and from the two places named: and the defendants having started a ferry some two miles west of Belleville, running to a point nearly opposite in Ameliasburg, was such a disturbance of the plaintiff's franchise, as entitled him to a declaration of a right to the exclusive use of the ferry. MARTY, C. J., dissenting, who considered that Ameliasburg having such an extensive frontage opposite Belleville, it was unreasonable, even if the plaintiff's claim of a right to ferry to and fro was good, to require that a person crossing from that township should be compelled to go to Belleville, although his destination might be several miles therefrom: and that by the terms of the license and lease the right of the plaintiff was only to ferry one way.

THIS was an appeal by the defendants from the decree of the Court of Chancery (27 Gr. 411) restraining them from disturbing the plaintiff in his right of ferrying between the city of Belleville and the township of Ameliasburg. The facts are fully stated in the report of the case in the report below, and in the opinions of the Judges on the present appeal.

Bethune, Q.C., and Moss, Q.C., for the appellants.

Robinson, Q.C., and J. K. Kerr, Q.C., for the respondent.

The points relied on and authorities cited appear in the argument.

June 30, 1882. PATTERSON, J. A.—This was an appeal from a decision of the Court of Chancery which, upon hearing, affirmed a decree made by the present Chief Justice of this Court while Chancellor.

The plaintiff by his bill, sets out his right to a ferry between the city of Belleville and the township of Ameliastburg, and charges the defendants with running a ferry boat between the township of Ameliastburg and a place in the township of Sidney which adjoins the city of Belleville, about two miles from the Belleville terminus of the plaintiff's ferry, and with having, for hire and reward, carried persons from Ameliastburg whose immediate destination was Belleville, and with having carried the same to Ameliastburg from Belleville, all of whom would, but for defendants' ferry, have used and travelled by the plaintiff's ferry; and he further charges that thereby the defendants intended to and did divert the said persons from the plaintiff's ferry to his detriment and loss: that the only object of the defendants in establishing their ferry was, to draw off passengers from the plaintiff's ferry: and that there is no occasion or reason for a ferry at the place where the defendants have it.

The defendants do not by their answer deny any of these charges. They put the plaintiff to proof of the right he claims, and deny that they are infringing any right he has; and they allege that they run their ferry boat under the sanction and with the consent of the municipal councils of Ameliastburg and Sidney, and that they believe that a license had been granted under an Order in Council to the township of Ameliastburg to establish a ferry between the two townships.

The decree declares that the defendants' ferry is an infringement of the rights of the plaintiff as lessee of the ferry between Ameliastburg and Belleville, and awards an injunction to restrain the defendants from maintaining and using their ferry between the township of Ameliastburg and the township of Sidney; and from running any ferry boat for the conveyance of people, &c.; and generally from carrying on a ferrying business across the Bay of Quinté between the said townships to the prejudice of the plaintiff, or so as in any way to interfere with his said ferry.

The objections urged against the decree cannot be stated.

more concisely than by reference to the formal
ons of appeal, which are thus expressed :

The alleged grant of ferry was void for uncertainty
ot describing the limits of the ferry.

The grant, if valid, was of a right to a ferry one way

The grant, if valid, was only of a ferry to a point in
Ameliasburg, and that point having been selected, the ferry,
valid both ways, to and from that point, has not been
ferred with by the appellants.

The grant, if valid, did not extend more than a mile
a half on each side of the point in Ameliasburg which
selected by Belleville as one of the termini, and the
ellant has not ferried to or from Ameliasburg within
limit.

The appellant has not ferried to and from the Belleville
inus within a mile and a half of the city of Belleville.

The respondent had no right to complain, as in this
the right, if any, was in the city of Belleville.

The Court of Chancery had no jurisdiction to grant
relief given by the decree.

The appellant did not interfere with the respondent's
ts, as he did the ferry between the two termini of the
ondent's ferry.

The grant to the city of Belleville was subject to
ocation by the Order of the Governor in Council ; and,
a if valid, it was revoked by the Order in Council of
Lieutenant-Governor of Ontario granting a right to
Ameliasburg to a ferry, and after such revocation the
ondent had no right to complain against the appellant
espect of the acts done by him.

ccasion has been given for some of the objections urged
nst the plaintiff's title by a series of instances of
ular want of care in the wording of written instru-
ts.

n 26th April, 1858, letters patent were issued, which
ted that the municipality of the town of Belleville had
tioned for a license of "one ferry from Belleville to
Ameliasburg," and then granted full license and authority
he municipality to establish a ferry "between the town
Belleville to Ameliasburg."

n 17th June, 1867, the Corporation of the town of

Belleville, by deed, after reciting, amongst other things, that, by the letters patent, a lease of the ferry "from the said town of Belleville to the township of Ameliasburg" had been granted, proceeded to demise and lease to A. L. Bogart, for fifteen years, "the said ferry, and the right to ferry to and from the town of Belleville aforesaid to the township of Ameliasburg aforesaid, as fully and to the same extent as the party of the first part might or could claim under the said lease or letters patent from the Crown."

In these four references to the ferry we have it described in three different ways—from Belleville to Ameliasburg, between Belleville to Ameliasburg, to and from Belleville to Ameliasburg—and not one of the four follows the language of the Statute 20 Vict. c. 7, under which the license was given.

One question naturally suggested by this very inaccurate language, the answer to which does not quite lie on the surface, is, whether Bogart, under whom the plaintiff holds, took the right to ferry both ways, or only from Belleville to Ameliasburg.

I agree with the opinion expressed in the Court below, that, if the plaintiff is entitled to recover at all, he must succeed even though the license reaches only the trip in one direction; but if the defendant has to account, the question will be of practical importance as regulating the amount of compensation.

I think the learned Chancellor took the correct view of the construction of the instruments, and I form my opinion upon the same reasoning adopted by him.

The much litigated monopoly which was the subject of *Newton v. Cubitt*, 12 C. B. N. S. 33, and several of the other cases cited, is an instance of a right acquired to ferry in one direction only. Whether such a right could now be granted by the Crown in this Province, may be at least doubtful, having regard to the legislation on the subject of ferries, as *e. g.* 8 Vict. c. 50; 9 Vict. c. 9; 20 Vict. c. 7., and the Acts respecting municipal institutions. But assuming the power to exist, I should be surprised to see a grant of

kind, because the motive and consideration being the promotion of the interest and convenience of the public, it is not easy to imagine circumstances in which greater efficiency would not be attained by the same craft being employed returning as well as going.

Do not read any of the statutes on the subject as having such a grant in contemplation, although the language is so general enough to permit it in case the municipality, or the Governor in Council as the case may be, found a case so exceptional as, in the public interest, to make it admissible.

Looking at the statute more immediately before us, we find it providing that when a ferry is required over any stream or other water in Upper Canada, and the two shores are in different municipalities not in the same county, the Governor in Council is authorized to grant a license under the great seal of the Province to either municipality exclusively, or to both conjointly, as may be most conducive to the public interest, such license to confer a right in the municipality or municipalities to establish a ferry from shore to shore on such stream or other water, and to such limit and extent as shall appear advisable to the Governor in Council, upon condition that the craft to be employed for the purpose of such ferry shall be propelled by wind, &c. When one shore is within the limits of a city, town, or incorporated village, and the other shore in a township or other rural municipality, the license shall in all cases be issued to the city, town, or incorporated village; but where the rural municipality opposite such city, town, or incorporated village is an island, then the license is to be granted to the island municipality.

Under this Act the license is always to be granted either to the body, or to two whose action under it must be in unison and not in conflict.

It is not unimportant to note that the object of this Act, as declared in the preamble, is to afford inducements for establishing steam ferries, which necessitate a considerable investment of capital, and involve expense in

their maintenance and working. The inducements intended plainly are the securing a remunerative return for the expenditure, while the paramount object is the providing for the public convenience, not the creation of a profitable monopoly irrespective of that convenience. No argument is required to shew that the object will be better attained by giving to the person or corporation providing the steamboat the gains from a paying trip each way, than by requiring the boat which takes over a load always to return empty. If, at a certain rate of fare, the traffic one way alone were found remunerative, the public interest would obviously require a reduction of the charge rather than the employment of two boats to do the work of one.

A grant of a ferry from one shore only would be made in the interest of the grantee and not of the public, and would be a monopoly of the odious sort, which, although, as the books shew, it was sometimes created in olden times, would scarcely be looked for under the legislation of people who make their own laws, and who look to the public good in regulations of this character, and not to the creation of advantages for individuals at the expense of the public.

I read the statutes in question and the instruments made under their authority in this spirit; and I think when we find a petition, preferred under the provisions of the statute, for a license for "one ferry from Belleville to Ameliasburg," and the consequent grant of authority to establish a ferry "*between* Belleville to Ameliasburg," we may, without unjustifiable violence to the language, construe it as intended to describe the privilege which the statute gives power to confer, namely, a ferry *from shore to shore*. I do not see in it any intention to narrow the grant authorized by the statute; and having regard to the declared object of the law, which, if it would not be defeated, would be, to say the least, less certain of attainment by limiting the privilege to the trip one way, I think we should give the fuller force to the language of the grant, unless clearly restrained by the necessary import of the language itself. In so treating it we do not, in my judgment, derogate from the rights of

public. We interpret the instrument as most effectually protecting the public interest in the mode contemplated and intended by the statute.

Then, the corporation having the license to establish a ferry from shore to shore, how has that power been exercised?

The license gives all the right which the corporation took under the letters patent. The apprehension, at all events, of the extent of the right is indicated by the words "to run from," notwithstanding the ingenious ambiguity of the phrase. The intention is also made clear by the provisions which bind the lessee to make regular trips between Ameliasburg as well as from Belleville.

The lessee, therefore, has the right to run his boat in either direction as a ferry.

This brings us to the consideration of the limits of the corporation's ferry, particularly in relation to the Ameliasburg shore, as to which there has been some discussion before us.

The power, under the statute, was, to license the establishment of a ferry "from shore to shore, and with such limits and extent as shall appear advisable to the Governor in Council." Under 8 Vict. ch. 50, it was unlawful to grant an exclusive privilege, after 20th March, 1845, for any greater distance than one mile and a half on each side of the point at which the ferry is usually kept. For the purpose of affording greater inducements to establish steam ferries, it was deemed proper by the Legislature, in 1857, to remove that restriction in the case of steam ferries licensed under the statute, 20 Vict. ch. 7. In this case it does not appear advisable to the Governor in Council to fix the limit and extent of the license otherwise than with reference to the town and the township generally. No power was given to the corporation of the town to establish a ferry between the town and township. It does not strike us that any other limitation was necessary or would have been of use. No power could have, under the statute, been conferred upon the township municipality to establish a

ferry to the town. The whole control of whatever ferry was to exist had to be in the hands of the corporation of the town. The ferry was established ; the particular route was fixed by the erection by the corporation of docks and landing places at each end. Of necessity, a steam ferry must run between fixed termini, and the principles laid down respecting ferries require that the landing places shall be at some convenient place to which the public can have access without committing acts of trespass, and where they can safely embark and land their horses, carriages, &c., for the transport of which the steam ferry boat must be suitable. In that sense the corporation established the ferry over the particular route ; and the lessee was bound by a covenant to make his trips from such landing places in Belleville and Ameliasburg respectively as the corporation should select and provide.

But the line of the ferry, or, to use the language of 8 Vict. ch. 50, the point at which the ferry is usually kept, is a very different thing from the exclusive privilege enjoyed by the grantee of the ferry. The privilege here was to carry between Ameliasburg and Belleville. I have no doubt that a rival ferry from any part of Ameliasburg to any part of Belleville would be an interference with that exclusive privilege. I do not perceive the importance, on either side of the present controversy, of the inquiry whether the end of a particular highway, or the whole front of the township, is the designated limit of the privilege on the southern shore.

The defendants do not contend for any right to run from Ameliasburg to Belleville ; and, on the other hand, it cannot be, and is not contended, that a ferry might not be lawfully established across any other part of the Bay of Quinté, from shore to shore, as from Ameliasburg to Sidney, or to any point, other than Belleville, where a ferry was required. A second ferry from Ameliasburg to Belleville might also be licensed, if required ; but, as pointed out already, the license must be given to Belleville. If that were done we should expect to find the limits of each ferry defined in the

use, or at all events defined in the leases to sub-lessees. Under the present circumstances it seems to me that any other definition than that given would have tended to throw doubt upon what was meant.

Then as to the infringement. I have already adverted to the absence from the defendants' answer of any denial of allegations that they carry passengers who are going from Ameliaburg to Belleville, and from Belleville to Ameliaburg; and that that is the object and intention of the establishment of their ferry; and that a ferry is not required at the place where they have it.

The plaintiff has given direct evidence in proof of the charges, and there is no more attempt on the part of the defendants to displace them by evidence, than there was to deny or explain them in the answer. Neither of the defendants tendered his own evidence. Some of the plaintiffs' witnesses were asked on cross-examination, and a question for the defendants was asked, whether persons coming from certain parts of Ameliaburg to Frankfort or Trenton would not save distance by crossing at the defendants' ferry instead of the plaintiff's, but no evidence was given of any one having crossed for that purpose, of the extent or even the existence of such traffic, or in what way it would require or justify the creation of a ferry.

The defence was in substance rested upon the attacks which I have discussed upon the plaintiff's title; upon an attempt to shew a license of which the defendants could avail themselves; and upon the contention that a ferry running from a point on the Ameliaburg shore, some distance west of the plaintiff's landing place, to a point in the river some distance west of the city of Belleville, was an interference with the plaintiff's right.

No license for the defendants' ferry was shewn. It appeared that an order in council had been made on 30th September, 1879, on the application of the councils of the townships of Sidney and Ameliaburg, for the issue of a license under the great seal to the corporation of Ameliaburg-

burg for a steam ferry over that portion of the Bay of Quinté between those townships, on conditions, one of which was, that the landing place of any boat to be run between the townships, under the license, should be at least one and one half miles from the western limit of Belleville at the water's edge. No license had, however, been issued, and the defendants were not otherwise privy to what was done than as having actively promoted the action of the township councils in applying for the license. The reason given for the license not having issued is, that neither the council of Ameliasburg nor Anderson, to whom they left the matter, and who seems to have been understood to be the person in whose interest the whole thing was being done, would pay the fees for it.

The evidence on the point aids the plaintiff in two ways, viz., by shewing that the defendants' ferry has not been established by law; and that the public demand for such a ferry has not been pressing, and therefore the motive for establishing it was not to supply a want.

For the law upon the subject it is scarcely necessary to refer to any case but *Newton v. Cubitt*, 12 C. B. N. S. 33. All the cases, ancient and modern, are there collected. *Huzzey v. Field*, 2 C. M. & R. 432, was one of the cases there relied on. One passage, from the judgment of Lord Abinger, C. B., in that case, covers nearly all our ground. "The right of the grantee," he says, "is, in the one case, an exclusive right of carrying from town to town; in the other, of carrying from one point to the other, all who are going to use the highway to the nearest town or vill to which the highway leads on the other side. Any new ferry, therefore, which has the effect of taking away such passengers must be injurious. For instance, if any one should construct a new landing place at a short distance from one terminus of the ferry, and make a practice of carrying passengers over from the other terminus, and there landing them at that place, from which they pass to the same public highway upon which the ferry is established, before it reaches any town or vill, and by which the passengers go immediately to the first, and all the vills and towns to which that highway leads—there could not

any doubt that such an act would be an infringement of the right of ferry, whether the person so acting intended to defraud the grantee of the ferry or not." And in *Newcomb v. Cubitt*, 12 C. B. N. S. 59, Willes, J., said: "The owner of the ferry has a cause of action for carrying in the line of the ferry, whether it be done directly or indirectly. He has a right to the transport of the passengers using the way; and if the alleged wrongdoer makes a landing place near to the ferry landing place, so as to be in substance the same, making no material difference to travellers, such a wrongdoer would be guilty of the wrong complained of in the present count; he would indirectly carry in the line of the plaintiff's ferry."

may refer to *Hopkins v. Great Northern R. W. Co.*, 2 Q. B. D. 224, as the latest case in which these principles are discussed, although upon the general question it may not add anything new.

We have in the case before us not only the fact of infringement within the definitions I have quoted; we have intention proved. It is shewn in the way I have stated out, and by the conduct of the defendants in carrying at lower rates than those settled by the corporation of the city and charged by the plaintiff.

We must not confound two things which ought to be kept distinct in our minds, viz., the immunity which a ferryman may claim who, in good faith and to supply a want, establishes a ferry which, without design on his part, may be made use of by persons who, but for the convenience he affords, would have gone by that of his rival; and the exemption of freedom from responsibility because the line of the ferry is outside of that granted to his rival, while he has established it and may use it solely to divert the traffic.

The latter is, on the facts before us, the position which the defendants have to maintain. If they can do so when their ferry happens to be two miles from the other, they may succeed on the same reasoning if nothing but the boundary line between the city and the township separated them.

It is obvious from a glance at the map supplied to us,

that to a large number of the Ameliasburg farmers, the distance to Belleville must be precisely the same whether they go by one ferry or the other; to many of them it will be nearer to go by the plaintiff's ferry; and one does not readily see how any of them can save distance by taking the defendants' ferry. The attraction is thus shewn to be the cheaper fare. It will not be overlooked that the defendants do not, by their ferry, save a person going from Ameliasburg to Belleville, or *vice versa*, any part of his land journey. The ferries are both direct lines on the shortest route across the bay. If some one had undertaken the enterprise of running a steamboat from a distance, say five or six miles east or west of the plaintiff's ferry, to a point near or even in the city of Belleville, and had thus shortened the land journey by carrying a longer distance by water, considerations might arise which are not presented by the facts before us. The question of *bona fides* would probably be the same; but as far as the act of carrying passengers was concerned, it would be arguable whether it differed from the case of passengers carried to or from Belleville by a steamer which plied between Kingston and Belleville, carrying Belleville freight and Belleville passengers to and from many stopping places, and amongst others to and from stopping places on the Ameliasburg shore.

Under the state of facts with which we have to deal, I entirely concur in the judgment of the Court below, and in dismissing this appeal, with costs.

BURTON, J. A.—I entirely agree in the view taken by my brother Patterson, of the spirit in which the statutes for the regulation of ferries, and the grants made under them, should be construed. They are passed in the public interest, and not with the view to the creation of a monopoly for the advantage of a particular individual or set of individuals; and the English cases on the subject of ferries, though very interesting, afford us no assistance in considering questions arising under our own statutes.

In those cases where the grants are shewn to have been

in order to confer a valuable monopoly on a certain individual, or in the case of an ancient ferry where a grant merely presumed, I can well understand that they should be construed strictly, but I see no reason for adopting such a mode of construction in the case of grants under statutes made by the people for the people.

The law provides that in a case like the present the license shall be issued to the city. It could never have been the intention of the city to apply for a license merely as a way, nor do I think the statutes had such a grant in contemplation. The language actually used in the grant is not possible, but I think it is doing no great violence to it to construe it as meaning between the two places.

It is said the grant was void in not describing the limits between the two ferries.

The effect of the grant is, to leave the selection of the termini of the ferry to the authorities of the town of Belleville, instead of having them fixed by the Governor and Council, but I do not see how the inhabitants of Ameliastown are in any way prejudiced by this general mode of selection being left to the Belleville authorities. They have in point of fact selected a terminus in Belleville, and another on the Ameliastown shore, which is not complained of as being unreasonable or unfit, and the actual route of the ferry is between these two points.

I think that there can be no objection in law to a grant made as this is; and the plaintiff's rights are neither greater nor less than they would have been had the Governor granted an exclusive right of ferry between the town of Belleville and the township of Ameliastown, fixing the termini as the town council have fixed them.

The grant is subject to revocation at any time, for any reason or without reason, so that the rights of the public are amply guarded.

The question of infringement of the plaintiff's rights is a question of fact; and there was ample evidence to sustain the conclusion at which the Court below has arrived. I will add nothing further, therefore, to what has

been said ; but agree that the appeal should be dismissed, and the judgment below affirmed.

MORRISON, J. A., concurred in the views expressed by PATTERSON, J. A.

HAGARTY, C. J.—The license was granted under 20 Vict. ch. 7 (1857). Section 1 declares that wherever a ferry is required over any stream or other water, &c., and two shores, &c., shall be in different municipalities, it shall be lawful for the Governor to grant a license, &c., to either of such municipalities exclusively, or to both conjointly, as may be most conducive to the public interest, such license to confer a right in such municipality or municipalities to establish a ferry from shore to shore on such stream or other water, and with such limit and extent as shall appear advisable.

Section three enables the licensed municipality to sub-let, &c., but they must not contravene the terms of the license from the Crown.

Section four. Where one shore is in a city, town, or village, and the other shore in a township or other rural municipality, the license shall always be issued to the city, town, or village, except in case of an island, &c.

A prior Act (1845), 8 Vict. ch. 50, sec. 5, enacted, that in any case where the limits to which the exclusive privilege of any ferry extends are not already established, such exclusive privilege shall not hereafter be granted for any greater distance than one and a half miles on each side of the point at which the ferry is usually kept.

The license here granted recites that the Belleville municipality had petitioned "for a license to said municipality of one ferry from Belleville to Ameliasburg, &c., and we have assented to the prayer of the said petition upon the terms and conditions hereinafter mentioned. Now therefore, &c., we do * * grant full license and authority unto the municipality of the town of Belleville to establish a ferry between the town of Belleville to *Ameliasburg* aforesaid, with power to sub-let the same."

the lease from the Belleville Corporation, after reciting Crown grant, leases "the said ferry and the right to go to and from the town of Belleville to the township of Ameliasburg," as fully as under the Crown grant.

The grant provides for trips every half hour between the points. The Corporation are to provide and select suitable landing places at Belleville and Ameliasburg, which points shall be the points of arrival and departure respectively. The Corporation are to have the right to alter or change landing places to such other place or places as they may deem advisable.

It does not appear that the municipality of Ameliasburg was mentioned in any request for the establishment of this ferry. It would seem to have been asked wholly in the interests of Belleville.

Ameliasburg is stated to be a township extending some ten or twelve miles along the shore opposite Belleville.

There is no attempt in this grant to fix any point on the shore, and no power given to Belleville to fix it.

Therefore the ferry is to be apparently from Belleville to ten or twelve miles of coast opposite. I am not aware of any grant of a ferry on such wide terms.

The old law limited the right to a mile and a half on either side of the point to which the ferry is usually kept. The amended law allows the Crown to appoint the limit of the extent.

We hold this to be a grant of ferry back and forward, and as there seems no limit or extent appointed except the line of Belleville on one shore and a line of ten or twelve miles of coast on the opposite shore.

Tripp v. Frank, 4 T. R. 666, points out the unreasonableness of such a claim.

We think we should require very clear words in a grant involving such a result as making this large township the terminus of the ferry.

People living five or six miles east or west of the point to which plaintiff plies would, to reach Belleville, be necessarily compelled to travel that distance, and no boat

could ply for hire on the public waters of the bay to accommodate them by an easier or shorter route.

It is of course clear that there can be a right of ferry only in one direction, as fully explained in *Newton v. Cubitt*, 12 C. B. N. S. 33.

Except by implication or assumption of a meaning in the Crown grant before us, we cannot see that there is any right conferred to carry from Ameliasburg to Belleville.

Belleville, it is stated, asks merely for "a ferry from Belleville to Ameliasburg." The Crown recites this request and assents to it, and then grants leave "to establish a ferry between the town of Belleville to Ameliasburg aforesaid."

It may be that as soon as the points or *termini* are established in actual use, that the ferry will then be considered as definitely there placed.

Here the municipality reserves the right of changing them.

The subject is discussed somewhat in *Pim v. Curell*, 6 M. & W. 260. Maule, J., says (as to the allegation in a declaration): "Suppose a plaintiff claimed a ferry from Middlesex to Surrey, must that be understood to mean from the whole of each shore? If it be unlawful from the whole frontage to the whole frontage, then, if the construction be ambiguous, it must be understood to mean from point to point." The very elaborate arguments of counsel contain many statements as to the general law of ferries which are not noticed in the judgment.

Newton v. Cubitt, was the case of an ancient ferry from the Isle of Dogs to Greenwich—only one way. The ferry was called Potter's ferry. Plaintiff claimed the right to carry from all parts of the island, which is about one mile square.

The defendant erected a pier called "Cubitt's pier," a distance of 1,280 yards from Potter's ferry, to meet the wants of Cubitt Town, a manufacturing place of recent growth, and carried from thence to Greenwich. This was the infringement.

the case is elaborately argued; and the judgment of Ashurst, J., very full. He says:

A ferry exists in respect of persons using a right of way where the line of way is across water. * * The franchise is established to secure convenient passage, and an exclusive right is given because, in an unpopulous district, there might not be profit sufficient to maintain the franchise if there was no monopoly. The ferry is unconnected with the occupation of land, and exists only in respect of persons using the right of way. The questions whence the franchise comes and whither they go are irrelevant to the exercise of that right, and the ferryman has no inchoate right in respect of any of them unless they come to his passage,

* * * * *

The owner of the ferry has a cause of action for carrying passengers on the lines of the ferry, whether it be done directly or indirectly. He has a right to the transport of the passengers using the way, and, if the alleged wrongdoer make a landing place near to the ferry landing place, so as to be in substance the same, making no material difference to the passengers, such a wrongdoer would be guilty of the wrong complained of in the second count—he would indirectly interfere with the right of the plaintiff's ferry.

Then, have the defendants done this wrong? We think

Cubitt Town is such a distance from Potter's ferry as is substantially important for those who have to pass there—to Greenwich; and it is found that the defendants had the purpose of evading the plaintiff's ferry, or of diverting traffic therefrom.

* If the public convenience requires a new passage such a distance from the old ferry as makes it a real inconvenience to the public, the proximity seems to us not unreasonable."

Tripp v. Frank, 4 T. R. 666, the ferry was across the river from Hull to Barton. Lord Kenyon says: "If main persons, wishing to go from Hull to Barton, had been carried to the defendant, and he had carried them at a little distance above or below the ferry, it would be a fraud on the plaintiff's right, and would be the ground of an action. But here these persons were substantially, and not merely, carried over to a different place,"

and Ashurst, J., adds, in effect, that it is unreasonable to require that a person crossing the Humber must be carried out of his way on account of the plaintiff's ferry.

The defendant carried persons from Hull to Barrow, a place two miles further down the coast than Barton. Plaintiff's boat did not go to Barrow but only to Barton, and he was not bound to land any one at Barrow. Buller, J., says: "The question of fraud might arise in this way; by saying that, though the defendant really meant to go to Barton, he went in fraud of the plaintiff's claim a little above or below the ferry. But the defendant had no intention of going to Barton; his place of destination was Barrow, at the distance of two miles from Barton, to which place the plaintiff's right does not extend, and to which he says he is not compellable to go."

It certainly appears to me to be most unreasonable that all the people for ten or twelve miles of Ameliasburg must be compelled to cross to Belleville by plaintiff's ferry, and without express words in the grant of license I am not disposed to infer that the Crown so intended.

We should, of course, endeavour to read a grant so as to give effect to it, and not to defeat it; but, on the other hand, if the words used literally only give a license for a ferry from Belleville to the extensive opposite shore we are not to enlarge it, without apt words, to a return ferry.

Generally there is no power in the licensee to change the termini once established. Here the corporations reserve to themselves the right to change.

If my view be correct, that it is only a ferry one way, then the case fails as to persons crossing by defendants' ferry to Belleville. There is evidence, however, that persons who have so crossed return also at times by defendants' ferry, and that might be an infringement if the latter be in such proximity as to be colourable.

According to the map in the appeal book, the defendants' ferry is two miles from the western limit of Belleville. The town has a large water front of probably two miles in extent, and the two ferries must be fully three miles apart.

On the Ameliasburg shore the ferries seem to be about two miles apart. In the Isle of Dogs case they were only about two-thirds of a mile apart. The old Upper Canada limit was one and a-half miles on each side of a ferry.

In 1879 the Executive Council of Ontario agreed that a license might be granted to Ameliasburg for a ferry over that part of the Bay of Quinté between the townships of Sidney and Ameliasburg, the landing place to be at least one and a half miles from the western limit of Belleville. This license was not, however, taken out by the township. West of the city limit of Belleville extends the populous township of Sidney, lying opposite to Ameliasburg township, and defendants' ferry is a point in Sidney distant two miles from the city limit. On the map it would appear to be a great convenience to large numbers of places and persons living in Sidney and Ameliasburg west of plaintiffs ferry, which runs into Belleville alone.

Villes, J., in *Newton v. Corbitt*, 12 C. B. N. S., at p. 10, discusses the question of proximity, and takes the analogy of markets and the old ideas on the subject: "It seems that the area within which a new market could become actionable would be diminished from a radius of fourteen miles by the public need; and on the same reasoning the area for the monopoly of a ferry could depend on the need of the public for passage."

The evidence of Morden, at p. 17 of the appeal book, is to the effect that this new ferry was a public necessity.

Even if this were a ferry each way, I think that persons, wishing to go either way to go into Belleville, might be lawfully carried over defendants' ferry.

As the case stands it seems narrowed down to the persons going back from Belleville to Ameliasburg by defendants' ferry, and we have further to narrow it to persons who coming from Belleville wanted to go to a point so near to plaintiff's ferry as to be a colorable evasion. The people who wished to go from Belleville to any point west of a colorable distance from plaintiff's ferry, I think, be lawfully carried by defendants' ferry: *Whitcomb v. Frank* seems so to decide.

If the defendants can lawfully carry a certain class from Belleville, it seems hard to throw on them the burden of deciding or ascertaining whether on landing them at their Ameliasburg terminus their destination may be east or

west, and whether they crossed with them to evade plaintiff's ferry or paying him a higher fee therefor.

I hardly see how plaintiff can succeed if *Tripp v. Frank* be sound law, even if we hold this to be a ferry back and forward.

I do not think that a ferryman plying between points a couple of miles distant from another ferry is bound to interrogate passengers who offer themselves to be ferried over, as to their ultimate destination after leaving his boat.

In my opinion, the appeal should be allowed, and plaintiff's bill dismissed.

In so deciding, I think I am following both the general law as to ferries and the spirit of our own legislation on the subject.

MARGARET CAMERON V. DONALD CAMPBELL.

Devise—Trustee—Statute of Limitations.

testator directed a sum of money to be invested, the interest whereof was to be employed in endeavouring to discover his brother, to whom the money was to be paid if discovered within five years from the death of the testator, and if not so found the amount to be paid to M. C. The executors took the bond of the persons liable to pay the amount to the estate, and subsequently an instalment payable under such bond was recovered by the executors and paid over to M. C. Afterwards a balance was recovered by one of the executors, who invested it in his business, and sought to defeat a suit to compel payment of the amount in the instance of the personal representative of M. C., by setting up the Statute of Limitations; more than ten years having elapsed since M. C. had become entitled to the bequest. [affirming the decree of the Court below, 27 Gr. 307,] that the conduct of the executors constituted them trustees, and that the right to recover the money was not barred by the Statute of Limitations; and that M. C., into whose hands the money had come, was chargeable with interest from the time of its receipt by him.

THIS was an appeal by Donald Campbell, one of the defendants in the Court below, from the decree pronounced in *Blake v. C.*, (27 Gr. 307,) where the facts sufficiently appear; and came on for argument before the Court on the 14th September, 1880, and, in consequence of the decease of Mr. Justice Moss, C. J., again on the 14th September, 1881.*

Moss, Q.C., and *Watson* for the appellant. The Statutes of Limitations constitute a complete defence to this suit, in which has been instituted to recover the amount of a legacy in favour of Margaret Cameron, deceased, and in which legacy accrued due more than ten years before the commencement of proceedings here. The learned Vice-Chancellor, we submit, erred in holding that the Statutes of Limitations were inapplicable; as no trust other than that which arises out of the office of executor, as such, was either alleged in the pleadings or proved by the evidence. The bill calls for an account of the legacy, and is brought against the defendants in their capacity of executors, and the appellant was not called upon to answer or meet

Present.—SPRAGGE, C. J., BURTON, PATTERSON, and MORRISON, JJ.A.

the case of any trust other than that imposed by his office of executor; and even if such case had been made by the pleadings, there was no evidence of such a trust.

The evidence establishes clearly that the moneys received by the executors had been so received for the purposes of the estate generally, and were not set apart for any particular purpose, and it appears that there is still a debt of the testator remaining unpaid which can only be satisfied out of the moneys in question in this cause. Under any circumstances the decree ought not to have directed an account as against Campbell alone of any moneys other than those shewn to have been received by him. No case was made for any further account, and none other was asked for at the trial.

In any view of the case the appellant can be held liable for interest, in respect of the sums with which he had been charged by the decree, for only six years before the commencement of this suit.

C. Robinson, Q.C., and *Sidney Smith*, Q.C., for the respondent. The pleadings and evidence establish a case of investment, by the executors, of £700, the legacy in question. This is admitted by the defendant Armour, as the bill is *pro confesso* against him, and the evidence of the defendant Campbell shews the same. The executors have dealt with this money by allowing it to remain in the hands of Jacques & Hay, and they did, with the assent and concurrence of the legatee, take security from that firm for the due payment thereof by instalments during seven years. The first instalment (£100) was due 1st January, 1864, and was paid to the legatee by the executors on or about the 11th of April following. The second instalment became due 1st January, 1865, but before that time (November, 1864,) the legatee died intestate, and no administration of her estate was granted till the plaintiff obtained a grant of letters shortly before the filing of this bill; for these reasons, even if the Statutes of Limitations would create a bar to the plaintiff's recovering, they did not begin to run as to the moneys in question until that time.

the defence is, upon the facts as proved and admitted, a meritorious one; and any amendments required to the pleadings to the evidence would be allowed. As the argument that some debt of the testator remains unpaid, it is only necessary to say that this line of defence is not set up by the appellant, and is contrary to the testimony given by himself; and also contrary to the fact. The cases cited appear in the judgment and in the report of the Court below.

June 30, 1882. SPRAGGE, C. J.—The question upon appeal is, whether the several sums of money in which the defendant Campbell is charged by the decree as having come to his hands under the will of Hugh Dougald Cameron, came to his hands simply as a legacy bequeathed by the will, or as a trustee.

The reasons of appeal raise no question as to the fact of the moneys having come to his hands, because, as I infer, the evidence having sufficiently established that fact.

The only questions raised by the reasons are, the character in which he received the moneys; the applicability of the Statute of Limitations, first, to the whole amount, then as to interest upon it, and then as to interest beyond six months.

The whole estate of the testator consisted of a sum of £1000, being the amount of a bequest to him by the will of John Dougald Cameron. Hugh, the testator through whom the plaintiff claims, died in 1857; the bequest from him had not come to his hands, but being part of a larger sum due by Messrs. Jacques & Hay to the estate of John Dougald Cameron, and which estate was abundantly able to pay the bequest to Hugh.

Hugh by his will, dated 19th September, 1857, made no disposition of it. After directing payment of his debts, and testamentary and funeral expenses, he directed that £700 should be invested by his executors, who are defendants in this suit; and that the interest thereof should be applied by them in trying to discover his brother

Edward Duncan Cameron, who, the will states, went to California: they to use all diligence in trying to trace him out by advertising in California papers, and otherwise as they may deem advisable; and the will proceeds:

"And in case they shall be able to discover him within the space of five years after my decease, then to pay the said sum of £700 to him for his own use and benefit; and in case the said term of five years from my decease shall elapse without my said executors being able to discover my said brother, I then direct my said executors to pay the said sum of £700 to my sister, Margaret Cameron, for her sole use and benefit."

He then bequeaths the sum of £300 to Louisa Maria McTavish.

The Margaret Cameron named in the will died in 1864, intestate, and the plaintiff in this suit is her personal representative under letters of administration granted, as I understand the evidence, on 3rd October, 1878.

The five years mentioned in the will as to expire before payment to Margaret Cameron of the £700 bequeathed, expired in 1862, some time after 19th September of that year; and on the 1st January following, an arrangement was made to which Margaret named in the will was an assenting party, under which in the judgment of the learned Judge, whose judgment is appealed from, this sum assumed the character of a trust fund, in which case the Statute of Limitations applying to legacies would not apply to it.

Out of the moneys due by Jacques & Hay to the estate of John Dougald Cameron, the £300 bequeathed to her by Hugh was paid, with the assent of the executors or executor of John Dougald Cameron, to Louisa Maria McTavish; and for payment of the other sum bequeathed by Hugh, £700, a bond was given by Jacques & Hay for payment of that sum to the executors of Hugh, in seven equal annual instalments, with interest half yearly; and it is moneys received by the defendant Campbell under that bond that the decree directs him to pay.

There appears to have been no investing of the £700 as directed by the will. The will of Hugh evidently contem-

and the early receipt of the whole £1000 from the estate of John Dougald Cameron; instead of which it remained unpaid during the whole five years, and stood in the shape of a debt due by Jacques & Hay to the estate of John Dougald Cameron. Mr. Armour explains to some extent why it was so. Mr. Moss put it to him while giving his evidence, that the bond of Jacques & Hay was not in any way an investment of the £700 under the directions of the testator, and Mr. Armour says: "No," and explains what it was. It was getting the money out of the hands of Jacques & Hay.

We had a good deal of difficulty; this £300 was given to Mrs. McTavish, and she was anxious to get it, and I had to go and see Chief Justice McLean [the representative, as it would seem, of the estate of John Dougald Cameron.] about it; and Mr. Campbell and I went up, and on the first occasion we were not able to effect anything, on the second time we saw Jacques & Hay, and they agreed to the settlement they would make; and we saw Chief Justice McLean, and he was unwilling to give us the order we wanted; and on telling him we had arranged with Jacques & Hay and got the £300 paid in cash, and a bond for the balance, Chief Justice McLean was unwilling to give the order because he said he was unwilling to have Jacques & Hay pressed for the money." In another passage he says: "We were getting in this £1000, it was the sum that was bequeathed, and there was plenty of money to pay this £300, this legacy, and it was set apart by Chief Justice McLean giving this order." In a previous part of his evidence Mr. Armour had hesitated to say that there was no setting apart of the sum of £700, to answer this debt, but said nevertheless that the bond of Jacques & Hay was intended to answer it, *i. e.*, after any debts were paid, adding that there were some small debts, one of which was not paid yet." This was said twenty-two years after the death of the testator. In another passage, it being put to Mr. Armour that at any rate Margaret was entitled to receive the £700 from the executors at the end of the five years, he answered: "Yes." It is not explained why the bond of Jacques & Hay was made payable to the executors instead of to Margaret Cameron herself; but I do not think it a circumstance of suspicion. Margaret was entitled

only upon a contingency, and the obligors might well desire not to be mixed up with the happening of that contingency.

The evidence of Mr. Armour makes the whole matter intelligible enough. I have quoted the exact language of his evidence at some length, in order to see whether upon the facts disclosed in it there was that which, assuming that up to the transaction with the estate of John Dougald Cameron, and the giving of the bond by Jacques & Hay, the bequest was a legacy simply, or whether it became thereupon a trust fund.

It was not necessary, in order to its becoming so, that the executors had assented to all the facts necessary to constitute it a trust fund to which Margaret Cameron was entitled; or that in fact she had become absolutely entitled. It had assumed the character of a trust fund if the executors had assented to *any* one having become entitled who was named as a legatee in the will. Their investment of the moneys in pursuance of the will was not necessary in order to their becoming a trust fund. Any setting apart by the executors, any assent even by them was sufficient. This is clear from the case of *Phillips v. Munnings*, 2 M. & C. 309; and the other cases cited in the judgment appealed from. *Dix v. Burford*, 19 Beav. 409, one of the cases cited, is especially explicit upon the point. The head note states the facts correctly: A testator bequeathed a mortgage secured by a conditional surrender of copyholds, and which had become absolute, to his two executors upon trust to continue and hold it upon certain trusts. The executors assented to the legacy, but did not procure themselves to be admitted, and by reason thereof one of them was enabled to receive the money and release the estate; and the money was misapplied by the executor who received it. The assent consisted in the executors signing a residuary account, which was passed at the legacy duty office; and being residuary legatees, dividing the residue between them. Sir John Romilly stated the first question to be whether the relation of trustee and *cestui que trust* existed, and added: "There is a specific legacy of this mortgage

£400, and a bequest of the residue to the executors. At the moment the executors assented to the bequest they became trustees for their *cestui que trust*; the £400 then passed to be part of the testator's assets, and it became a trust fund for the benefit of the plaintiff for life, and afterwards for his children; and the executors became mere trustees for them of that fund. * * It is a case of every day's occurrence for executors to be turned into trustees." The assent in the case before us was unequivocal. The giving of the bond for the amount of this legacy, their obtaining the assent of Margaret Cameron to the terms of the bond, and the payment of the £300 legacy to Mrs. Tavish, were each of them acts of assent.

I think further, although, in my opinion, it is not necessary for the determination of this case, that the money in question was made a trust fund by the terms of the will itself.

In *Thomson v. Eastwood*, L. R. 2 App. Ca. 215, in the absence of Lords, a legacy was given in the following terms: "I hereby appoint my after named executor, Charles Eastwood, my youngest brother, to be trustee for the following legacies"—several were then named, and the will went on—"considering that money will be more essential to my dear brother Samuel Eastwood * * than a distant possession of land, I bequeath to my said eldest brother Samuel, during his natural life the interest of £3,000, and, after his death, to his eldest son James Eastwood, by his last wife Margaret Javoux, or Moron, or Eastwood, till he attains the age of twenty-one, and then to obtain the principal."

* "I order that my youngest brother Charles Eastwood shall be liable to all my lawful debts of every description, and pay them as soon as he can, and also my legacies when regularly due," and all expenses, "and to enable him to do all this, I bequeath, unconditionally, to him all my estates and landed property, with all the emoluments belonging to them, in the County of Armagh; I also bequeath to him, the said Charles, all my estates," &c., "with all their emoluments, in the County of Louth, or elsewhere," &c.

The defence in that case was, as it is in this, the Statute of Limitations. Lord Cairns, Lord Chancellor, said, p. 228: "Upon the construction of the will I am bound to say that

I cannot entertain any doubt whatever that that which is created is not merely a charge of a legacy, but is a distinct and clear trust for the payment of that legacy." So Lord Hatherley, p. 245: "Upon the whole of that will, it appears to me impossible to doubt that a distinct and express trust is created for the payment of this legacy."

Lords O'Hagan and Blackburn expressed similar views, and Lord Gordon concurred.

It is true that in the case before us the word trust is not used in the will, as it was in the two cases that I have last cited; but it is quite clear that a trust may be well created without the use of the word trust, as it is well put by Mr. Lewin: "A person may declare a trust either directly or indirectly: the former, by creating a trust *eo nomine*, in the form and terms of a trust; the latter, without affecting to create a trust in words, by evincing an intention which the Court will effectuate through the medium of an implied trust:" *Lewin on Trusts*, 6th ed., p. 95. The words used in the will before us are quite sufficient for the purpose.

I think that upon the evidence the defendant is properly chargeable with interest from the time that the moneys in question came to his hands.

There is not, in my opinion, anything in the objection that a debt of the testator still remains unpaid. As to debts, Mr. Armour only says: "There were some small debts. * * One of them is not paid yet," he does not give the amount or say why it was not paid. When he gave his evidence twenty-two years had elapsed since the death of Hugh. We have no account of the interest payable on the legacy bequeathed by John Dougald Cameron, whether applied in payment of debts, or how; or whether merely not looked after by the executors of Hugh. This small old unpaid debt can be no reason for the man who has received these moneys not accounting for them.

Nor is the circumstance of the executors not advertising for Edward Duncan, as directed by the will, any reason for the man receiving moneys not accounting for them. It would be making his own wrong an excuse for not paying over money which, if he had done what the will

directed to be done, would have been payable long since to Edward Duncan if he had turned up, or to Margaret Cameron if he had not. Twenty years have elapsed since the expiry of the five years. The objection suggested is not taken by the reasons of appeal, and the only difference would be, not that Donald Campbell should not pay the moneys received by him, but that he should pay them into Court; but under the circumstances I do not think it necessary to make any change in that respect any more than in any other respect in the decree.

Upon the whole my opinion is, that the appeal should be dismissed, with costs.

BURTON, J.—It appears that Margaret Cameron was consulted in reference to the bond given by Jacques & Hay, and her right to the money admitted subject only to the contingency of Edward Duncan Cameron, making a claim to it within five years.

Mr. Arnour the co-executor with the appellant, states “She was entitled to the fund and she concurred as we did in the view that it was useless advertising for the brother.” And £100 was paid to her on her furnishing security to refund in the event of the brother making a claim. After that could the executors, in the event of the death of the brother being established, dispute her right to the legacy?

That they did not really apprehend any encroachment upon the fund from debts of the testator is manifest from their paying over in full the other legacy of £300. It raises at all events a very strong presumption that all the debts of the estate were then satisfied.

It is not too much to assume that when the right of Margaret Cameron was thus recognized, the executorial duties of these executors had ceased. There is no evidence of the subsequent payment of any debt or the performance of any duty pertaining strictly to their character as executors. The fund in the hands of Jacques & Hay they then held in trust for the legatee, of whom the present plaintiff is the personal representative, and a person so situated in posses-

sion of funds, which he knows not to be his own, but which he chooses to misapply as this appellant has done to his own use, is not entitled to have the law strained in his favour.

The executors in this case were bound by the terms of the will to invest this money, and apply the interest in endeavouring to trace out the brother; and it may be that by reason of the neglect of their duty in advertising, as directed by the will, they may have left themselves exposed to an action by him in the event of his being alive and making a claim, but that ought not to afford them any answer against this claim. Had they performed their duty Margaret Cameron would have been entitled to claim the legacy at the expiration of the five years. She was admitted to be the party entitled, and the fund was set apart for this specific payment, and ceased in my opinion to bear the character of a legacy; and when the appellant appropriated it to his own purposes he was guilty of a breach of trust; and if the bill has been erroneously framed as a bill to enforce payment of a legacy when it should have been to compel the appellant to account for a breach of trust, it should be amended so as to conform with the evidence, and a decree made in accordance with such a bill.

I am of opinion therefore that this appeal should be dismissed, and the decree affirmed, with costs.

PATTERSON and MORRISON, JJ.A., concurred.

NIXON V. MALTBY.

Landlord and tenant—Eviction—Surrender.

an action to recover a year's rent on a covenant in a lease for three years, it was shewn that the defendant had harvested the crops on the farm, and that they, together with the barn and stable, were destroyed by fire before the expiration of the year, and that he was paid the insurance money; whereupon he left the farm, and the plaintiff entered, ploughed, and put in a crop. The plaintiff afterwards applied on several occasions to the defendant for payment of the rent, when the defendant said he had not any money. It was shewn that a proposition had been made to leave the matter to arbitration.

Id [affirming the judgment of the Judge of the County Court of Peel], that the acts of the plaintiff did not amount to an eviction, that there was not evidence to support a surrender in law, and that the plaintiff was entitled to recover; BURTON and PATTERSON, J.J.A., *substante*.

THIS was an appeal by the defendant from the judgment of the Judge of the County Court of the county of Peel.

The action was originally instituted in the County Court of Halton, by John Nixon, against the defendant Richard Maltby, to recover payment of a year's rent, the declaration of which alleged:

"That the plaintiff, by deed, let to the defendant certain lands and premises, being composed of the east half of lot number nine, in the tenth section of the township of Esqueping, excepting thereout five acres occupied by the orchard and dwelling house of the said plaintiff, to hold for three years from the first day of April, one thousand eight hundred and seventy-nine, at the yearly rent of two hundred and eighty-five dollars, payable for the first year of the said term on the fifteenth day of November, one thousand eight hundred and seventy-nine, and thereafter in semi-annual payments on the first days of October and April in each year, and the defendant, by the said deed, covenanted with the said plaintiff to pay him the said rent, as aforesaid, and one year's rent is now due and unpaid, and the plaintiff claims three hundred dollars."

To this declaration the defendant pleaded: First, *Non factum*.

Second, "That before the said rent became due the said demised premises, and all the residue of the said term then to come and unexpired term, were duly surrendered by act and operation of law, that is to say, the defendant then giving up to the plaintiff and the plaintiff then accepting from the defendant the possession of the said demised premises, with the intention of then putting an end to the said term."

"And for a third plea, the defendant says that before the said rent became due the plaintiff agreed with the defendant that in consideration of the defendant surrendering and giving up possession of the said term, and the said demised premises, the plaintiff would not demand any rent whatsoever, and in pursuance of the said agreement, and before the said rent became due, the defendant did surrender and give up possession of the said term and the said demised premises, and the plaintiff accepted the possession thereof from the defendant."

And, fourth, a plea of set-off.

On the 6th of June, 1881, the plaintiff joined issue with the defendant; on the 14th of that month, an order was made at Chambers changing the venue from Halton to the county of Peel, and the case came on for trial before the County Court for Peel, on the 17th of the same month, when the defendant withdrew his plea of set-off, and the plaintiff proved his case by putting in the lease of the premises, the execution whereof was admitted; as also the entry into possession by the defendant.

For the defence the defendant was examined on his own behalf, and swore :

"I went into possession under the lease on 5th April, 1679, and remained five months, leaving about last of August or first of September; I could not stay in, having lost all I had by fire; on 1st of May all my barns, grain, and seed were burned; barn and stable rebuilt; burned again after crop in, on 25th August; I was insured for \$600; received \$394; I then went out of possession; George, plaintiff's son, asked me for rent on the 26th August; after I went away the Nixons went on, George and Albert, plaintiff's sons, and put in wheat that fall in back end of September and beginning of October; I was not on the premises again; I did not tell plaintiff anything when I left; fall wheat was in the ground when I went there; eleven or twelve acres; one field; I reaped it for myself; I also reaped wheat in orchard, about one and a half acres; fall ploughing done, twenty-seven acres, which I sowed with wheat and barley, and reaped; I also reaped oats and pease, which I reaped for myself; also hay. I stacked and threshed the pease, wheat, oats, barley, all of which and the threshing machine were burned; father owned the machine; I summer-fallowed a piece; George asked me for rent; I said I had no money, had not got any insurance yet; he said if I did not get my insurance he would never ask me for rent; he asked me again in March, 1881; I said I had got no insurance; I wanted to settle by arbitration and he would not do it; I saw plaintiff in Norval in February last; he said he would never sue me; he said he understood I had given George a note; I said I had not."

William Maltby was sworn as a witness, and stated :

"I saw plaintiff after the second fire ; I was hired by George Nixon to plough field and put in wheat ; my son Garbutt helped me ; George Nixon paid me ; I think \$32 ; he is plaintiff's son ; did not speak to plaintiff about it ; George got somebody to put in rye ; and there was some fall-ploughing done by him and his brother Albert ; rye put in in October ; fall-ploughing in fall."

Garbutt Maltby, another witness, was also sworn, and stated :

"I am defendant's brother ; worked on the farm in question about the end of September or 1st of October, 1879, for George Nixon ; put in wheat ; ploughing, harrowing, and fall-ploughing same fall while living with their father, 1st November, and all through November ; early put in field of rye on same farm in October."

Thereupon a formal verdict was entered for the plaintiff for \$285, subject to points of law on the facts given in evidence under second plea.

Subsequently, and in July Term (5th July) 1881, a rule *nisi* was obtained by Mr. *R. M. Fleming*, on behalf of the defendant, to set aside the verdict thus entered for the plaintiff, and to enter a nonsuit or verdict for the defendant, or grant a new trial on the grounds :

(1) That the said verdict is contrary to law and evidence, and the weight of evidence. (2) That the said verdict is also contrary to the Common Law Procedure Act, and the Law Reform Act. (3) That the said cause was improperly, and contrary to law, withdrawn from the jury called to try the same. (4) That the said cause was, by the learned judge of this Court, reserved for judgment.

After hearing the arguments of counsel, the learned judge, on the 22nd of July, discharged the rule *nisi*, when he read the following judgment :

SCOTT, J.—"The execution of the lease being admitted, the only evidence for the defendant is under the second plea, and the evidence under that plea is confined to the facts that the defendant, who did not at any time reside upon the said demised premises, did at a certain time cause to go thereupon ; that thereafter, and before the rent became due, the plaintiff, who resided upon the farm—a portion of which was the subject of the demise—by his sons and servants, went upon the land demised, sowed wheat and rye upon the ground, a part at least of which had been prepared therefor by the defendant, and did some fall-ploughing.

"The plaintiff raised the technical objections that the evidence does not shew that the work was done by or under authority of the plaintiff, or that he, at the time of the alleged surrender, was the holder of any estate that would support a surrender. On the first point I am satisfied, and so I think would any jury find, that the work was done by plaintiff's authority; and on the second I decide that the relation of landlord and tenant having been established by deed, it must, in the absence of evidence to the contrary, be assumed as still subsisting at the time of the alleged surrender.

"These objections thus disposed of, the simple question of surrender or no surrender remains for consideration. There was no agreement as to giving up the place. There was no notice given by defendant that he had given, or would give it up; and there is no evidence other than the inference from his acts that the plaintiff took possession with the intention of putting an end to the lease. Such intention is pleaded, and it appears to me to be a necessary ingredient in a surrender by operation of law. The facts shewn are certainly consistent with such intention, and if not consistent with any other reasonable intention the judgment should be in defendant's favor. But I am strongly of opinion, not only that the facts are not inconsistent with other reasonable intentions, but that such other intention should be taken as the governing one, and that what the plaintiff did was, as it were, merely preservative of his own interest in the hands of the defendant. When the defendant took the place he got with it a crop of Fall wheat in the ground; when he quit working it was time to put in another such crop. The plaintiff seeing that the defendant did not put it in, and knowing that if it was neglected the value of the place another year would be seriously impaired, put in the wheat himself—the same remarks apply to the putting in the rye and doing the fall-ploughing, only part of the latter having been done when the rent became due. I think all the work shewn to have been done, was in a manner necessary, and is no more an evidence of an intention to put an end to the lease than would be the execution by a landlord of necessary repairs; and that at least up to the time the rent became due, the defendant, notwithstanding anything given in evidence, retained his position as tenant, and would have had the right, if so inclined, to go on and complete the term. Perhaps the question of intention should have been left to the jury, but all they could do would be to draw inferences from the facts, which inferences would be subject to review, and I thought, and it was agreed to, that the facts might as well be submitted to the Court. On the facts so submitted I think that the defence so set up by the second plea is not sustained.

Apart from the purely legal question, I think the justice of the case is with the plaintiff, and that he would be entitled to recover the greater part, if not the whole, of the rent claimed under a covenant for use and occupation, and that an amendment adding such count, if applied for at the trial, should have been allowed.

Under all the circumstances, I think plaintiff's offer subsequently made, as shewn by evidence in a cross action, to take \$100 in full, was a liberal one, and should have been accepted. On the trial of the cross action, I

this so strongly that I suggested (plaintiff consenting) to change the dict in this action to \$100, with costs, defendant to withdraw and pay of cross action.

ale nisi discharged with costs unless defendant consents to arrangement posed.

From this ruling of his Honour, the County Court ge, the defendant appealed, and the appeal came on for argument before this Court on the 8th of November, 1881.*

James Fleming, for the appellant. The determination the term by the plaintiff might take place independently and even against the intention of the parties: *Lyon v. d.*, 13 M. & W. 285.

The inferences of fact drawn by the learned Judge from evidence were strained and unnatural, especially in the ence of evidence on the part of the plaintiff as to what real intention was in entering upon the demised pre- es; and his acts were not merely preservative of the ised premises, and should not have been so inferred n the evidence: *Oastler v. Henderson*, L. R. 2 Q. B. D. ; *Phené v. Popplewell*, 12 C. B. N., N. S. 334; *Carpenter Tall*, 16 C. P. 200; *Bradfield v. Hopkins*, 16 C. P. 298. der any circumstances, however, the question of intention he plaintiff was essentially one for the jury, and should have been withdrawn from them. It was also insisted t the demands for rent by the plaintiff's son and agent ore any was due, was evidence of an intention on the ntiff's part to resume possession of the demised pre- es. As to the compromise proposed by the learned ge, Counsel contended that it was unfair, because in cross-action tried before the same Judge, the defendant intiff in the cross-action) was disappointed in obtaining dence which otherwise might have led to a heavy dict in his favour.

Laidlaw, for the respondent. The plaintiff had a ffect right to adopt the course he did, in order to preserve premises in a proper state to rent to another tenant, hout in any way releasing the defendant from his cove-

Present.—SPRAGGE, C. J., BURTON, PATTERSON, and MORRISON, JJ. A.

nant to pay rent, As landlord he had a right to enter upon and repair any house that might have been upon the property, without in any way being considered to have accepted a surrender of the term.

June 30, 1882. SPRAGGE, C. J.—The subject of the lease in this case was a piece of farm land, east half lot 9, 10th concession, Esquensing, less five acres occupied by orchard and dwelling house, reserved by the lessor, the plaintiff. The lease was for three years from 1st April, 1879, at \$285 a year. The first year's rental was payable on the 15th November, 1879. The action is in covenant for the payment of this first year's rent.

A fire occurred on the 25th of August, 1879, which destroyed a large portion of the crops reaped by the defendant in that year.

The defendant, according to the note of his evidence, thus describes the condition of the land leased to him when he went into possession in April of that year: "Fall wheat in ground when I went there; eleven or twelve acres, one field, I reaped it for myself; I also reaped wheat in the orchard, about one and a half acres; fall-ploughing, done twenty-seven acres, which I sowed with wheat and barley, and reaped; I also reaped oats and pease which I reaped for myself, also hay. I stacked and threshed the pease. Wheat, oats, barley, and threshing machine, burned."

The hay and pease I infer, were not burned.

The defendant was insured for \$600, and received \$394; a portion of it about October, 1880, and the rest in February; he does not say in what year. He does not say whether the amount he received did or did not cover his loss.

The defence to the action was a surrender "by act and operation of law" as put in the second plea "by the defendant then giving up to the plaintiff (before the rent sued for became due), and the plaintiff then accepting from the defendant the possession of the said demised premises, with the intention of then putting an end to the said term."

There was not in fact any agreement in relation to a surrender of the term, or as to the defendant giving up the

ce at all. The defendant simply left the place soon after fire, about the end of August or first of September ; and he says: " I was not on the premises again ; I did not plaintiff anything when I left."

The plaintiff in the course of the same Autumn, beginning about the end of September, and in the months of October and November, had some ploughing done, and the fall crops put into the ground. And this is what is relied upon by the defendant as a giving up of the place to him, and the acceptance of it by the plaintiff before the rent became due.

These acts of the plaintiff may be regarded in one aspect as a resumption of the possession of the place, assuming that the defendant had abandoned it ; but are they necessarily to be so regarded ? There certainly was not in strictness any surrender by act and operation of law. What it is, is explained by Lord Wensleydale, then Baron Keble, in *Lyon v Reed*, 13 M. & W. 285 ; and by Sir John Robinson, in *Doe Burr v. Denison*, 8 U. C. R. 185. The doctrine has come to be applied to acts *in pais*, by which a party is estopped from asserting that the term still continues.

The Acts and the surrounding circumstances we find relied at in all the cases. As was said in *Lyon v. Reed*, referring to an act relied upon as an estoppel : " It is an act which like any other ordinary act *in pais* is capable of being explained ; and its effect must therefore depend not on any legal consequence necessarily attaching on, and arising out of the act itself, but on the intention of the parties."

In *Phené v. Popplewell*, 12 C. B. N. S. 334, and in *Oastler v. Henderson*, 2 Q. B. D. 575, the Courts very carefully took into account the position in which the landlords were placed by the conduct of their tenants, and were slow to attach to acts of the landlord the character of an acceptance of a surrender of a lease unless they were acts unequivocally of that character. I refer particularly to the language of Mr. Justice Willes, in the earlier of these two cases. In the later case, which was in the Court of

Appeal, there had been a lease of a house for seven years from Lady-day, 1868. The action was for rent up to the actual letting of the house by the landlords in March, 1872. The plea the same in substance as in this case. In the Autumn of 1868, the tenant left England for America, leaving the keys with an agent to let the house if he could, or make terms with the landlords. The agent was unable to find a tenant, and in December, 1868, gave the keys to a servant of the landlords. Early in 1869, bills appeared in the windows advertising the house to be let, and giving a reference to a house agent, one Bonham, who was not the agent with whom the tenant had left the keys. Bonham shewed applicants over the house; and in 1870, the landlords occupied two of the rooms for the purposes of their business. It was held that the plaintiffs were entitled to recover for rent up to the actual letting in March, 1872. Cockburn, C. J., says, at p. 578: "The plaintiffs, the landlords, took the keys because they could not help themselves, the defendant being gone, and, for all they knew, not likely to return. Then they try to let the house, but what else under the circumstances were they to do? They must do the best they could. If they had let the house, they would have done so as much for the benefit of the defendant as of themselves. The mere attempting to let does not amount to an estoppel. The landlords did nothing but what they might reasonably be expected to do under the circumstances for the benefit of all parties."

Of a similar character is the language of Lord Justice Bramwell, at the same page, : "Looking at all the facts of the case together, including the fact that the defendant had left the country, what would a reasonable man do under the circumstances? Why, exactly what the plaintiffs did, endeavour to let the house;" and he considers the using of two of the rooms, "a very natural thing for them to do," under the circumstances. And Lord Justice Brett advertising to the defendant's contention that the lessors were estopped from setting up the continuance of the particular estate after December, 1868, expresses his opinion that that is not the case, adding: "There can be no estoppel by mere verbal agreement; there must be in addition to such

ment some act done, which is inconsistent with the continuance of the lease."

This brings me to the inquiry, whether what was done was inconsistent with the continuance of the lease. The act—it may properly be termed misconduct of the tenant—placed his landlord in a very difficult position. He went away without a word as to his intentions; he might or might not return. There had been a fire before his tenancy had commenced, and he had continued to live there; he might continue tenant still. It was his obvious duty if he did not desire to do so, to inform his landlord; but he left him in a state of uncertainty. Might not the landlord properly do what would be for the benefit of the tenant in the due course of husbandry for the benefit of which the land was let? The two might have the land, without its being put to an end by putting an end to the lease, or an intention to do so. He had, forced upon him by his tenant, the alternative of either doing what he did as a matter of husbandry, or having the farm to some extent run to waste. There is no evidence to shew that what he did was improvident or unnecessary. If he had been asked whether he had done what he did, he might well have answered that under the circumstances he could not have done otherwise. That whether his tenant returned or not, it was not for him to do, and necessary in the interest of husbandry to do what he had done. If pressed to say whether he would allow his tenant to come back and enjoy the benefit of what he had done, he might well say that he did not know that he could prevent his doing so, but if he did come back he should put it to him that he should reimburse him the cost of what he had done; and whether he could get it from him or not he thought it best to let him, whether he came back or not, to put the farm to work for the next year's crop. If he could reasonably be satisfied upon such reasons as I have supposed he might be, his doing what he did was not inconsistent with the assumption that the lease might continue. Still less was it inconsistent with the actual continuance of the

defendant did not deny liability; did not allege that he had been turned off, or had surrendered. He had had beneficial occupation, and was liable to pay for use and occupation, if not liable upon his covenant; and when asked he only excused himself from present payment, pointing to expected insurance money as the fund which would enable him to pay: this occurred, besides the first application, in March, 1880, and in February, 1881.

In my opinion the appeal should be dismissed, and with costs.

PATTERSON, J. A.—This action was commenced on 6th May, 1881.

The plaintiff seeks to recover one year's rent of a farm which he let to the defendant by deed for a term of three years from 1st April, 1879, at \$285 a year. The first year's rent was payable on 15th November, 1879, and the succeeding years in half-yearly payments on the 1st days of October and April in each year.

No rent was paid. There were, therefore, by the terms of the lease, two years' rent due when the action was brought. It is however brought for only one year's rent, namely, that which fell due on 15th November, 1879.

The evidence reported to us is very short. It was evidently supplemented at the trial by facts known to all parties and not formally proved. We have therefore to gather our information partly from the evidence, partly from what is said by the learned Judge in his judgment, and to a small extent by inference from what is told us.

It appears that the defendant took possession on the 5th April, 1879. He did not live on the place. The plaintiff had reserved from the lease and occupied himself the dwelling-house and five acres on which was the orchard. On the 25th August, 1879, the barn and stable were burned with the defendant's crops, implements, &c. This was the second casualty of the kind, a similar fire having occurred in May, 1879, after which the barn and stable were re-built. The defendant was insured for \$600, and received \$394. I

not know for which fire. The defendant ceased to occupy the premises about the 1st of September, 1879. He said, "I did not tell the plaintiff anything when I left." That the plaintiff's sons and servants sowed fall wheat and rye, some of which was on ground summer-fallowed by the defendant, and they ploughed other ground. Part of this work was done by a son and part by a brother of the defendant, working under George Nixon, one of the plaintiff's sons, and paid by him. The plaintiff's sons in the fall they did acted for and by the authority of their father. George Nixon sometimes asked the defendant for money.

He did so on the 26th August before any was due. When he asked him—but whether at the date just mentioned, or at some other time, I do not know—the defendant said he had no money: that he had not yet got his insurance; and George said that if he did not get his insurance he could never ask him for rent. He asked him again in March, 1880, and the defendant said he had got no insurance money.

The first insurance money the defendant received was in October, 1880, and the rest of what he got he received in February, 1881. The defendant wanted George Nixon to settle by arbitration and he would not do it. In February, 1881, he saw the plaintiff, who said he would never sue him, and said he understood the defendant had given him a note, which the defendant told him was not the

These are the whole facts of which there is evidence in evidence in reply was given on the part of the plaintiff.

The contention of the defendant is, that the facts amount to a surrender by operation of law, which frees him from liability for the rent sued for.

At the trial, the learned Judge entered a formal verdict against the plaintiff for \$285, "subject," as he notes it, "to law facts given in evidence under second plea."

That plea sets up a surrender by operation of law, before the rent became due, by the defendant giving up to the plaintiff, and the plaintiff accepting from the defendant, possession of the demised premises with the intention of putting an end to the term.

The defendant,, in his rule *nisi*, and in his grounds of appeal, complains of the withdrawal of the case from the jury, who should, he contends, have been allowed to dispose of the question of intention; but there is no note of such an objection having been taken at the trial; when, if the defendant had so desired, the Judge would doubtless have taken the opinion of the jury on the point.

It is plain from what is said at the close of the judgment, that the Judge understood that the course he took was assented to.

The learned Judge sustained the verdict; and holding that, there being no evidence, beyond the acts of the plaintiff, of his having taken possession with the intention of putting an end to the lease, and those acts being, in his view, merely such as were preservative of the interest of the plaintiff, he concluded that at least up to the time the rent became due, (which would be the 15th November, 1879) the defendant retained his position as tenant, and would have had the right, if so inclined, to go on and complete the term. He remarked that, apart from the purely legal question, he thought the justice of the case was with the plaintiff, and that he would be entitled to recover the greater part if not the whole of the rent claimed under a count for use and occupation, and that an amendment adding such a count, if applied for at the trial, should have been allowed.

I cannot say the facts strike me as leading at all forcibly to the inference drawn from them by the learned Judge. One fact, not noticed, except incidentally, in the judgment, is, that the plaintiff is not proceeding for the second year's rent, although by the terms of the lease it was due a month before the action. I infer from this, and from the absence of evidence to the contrary, that he has retained possession of the farm. It strikes me as strange that not a word is noted as having been said or asked, at the trial in June, 1881, respecting the occupation of the farm during the year 1880, beyond the defendant's statement that he has not been on it since he left in 1879.

likely every one at the trial knew how it was. I do regard the second year's rent as without interest to us in this suit. The fact that it is not claimed, although due on the terms of the lease before the suit was commenced, is a presumption, that during that year, at all events, the landlord considered there was no tenancy; but he gives no explanation as to when the tenancy ceased, which he has impliedly admits had ceased before the first of April. Why should the inference not be drawn, that it had when he entered in September, 1879? It seems to me that he could not with reason complain if, under the circumstances, that inference were drawn.

It is true that a landlord may accept possession at some time of time after the tenant abandons it, without such acceptance necessarily relating back to the time of the abandonment. That was the case in *Oastler v. Henderson*, 12 Q. B. D. 575. The surrender by operation of law is date only from the entry of the landlord into possession.

But here, as in *Phené v. Popplewell*, 12 C. B. N. S. 100, and more distinctly than in that case, possession was taken at once. The taking of possession in September, 1879, was an act inconsistent with the continuance of the tenant's particular estate. It would not have been lawful if the term had been in existence. I do not regard the operations of ploughing, harrowing, and sowing, as acts of equivocal nature. I think they are as distinct acts of possession as one can do. I agree that the landlord may have considered them necessary for the due cultivation of the farm, and therefore important in his interest; but if he assumed to do them himself, he can scarcely be heard to say that he regarded the farm as still the tenant's. He evidently did what he did because the tenant had abandoned the farm. No doubt he did wisely. Fall crops on his own land were better than neglected land and an insolvent tenant. He chose prudently between the two; but he did choose. He reaped the crops, as I should suppose, and he does not offer to account for them.

From all these considerations, coupled with the absence

of explanations from the plaintiff, I confess that the strong inclination of my opinion is that the issue should be found against him. Such a finding would, in my judgment, be in entire harmony with the principles laid down in the cases which have been referred to.

But *audi alteram partem*. The learned Judge in the Court below, was not of my opinion, and I cannot say that the evidence is incapable of being so looked at as to justify his conclusion. There is the fact of the demand of rent on various occasions after the plaintiff had resumed the occupation of the fields he ploughed and sowed, which was never met by a denial of the defendant's liability, or the assertion of either surrender or eviction. I do not, in my own mind, place much stress on this. We are not told what rent was demanded. The plaintiff might have told us, if he had thought the explanation would have helped him. By the terms of the lease, the rent fell due on the 15th November, four months and a half in advance of the end of the year, yet the first demand was even earlier than the lease warranted. The defendant undoubtedly ought to have paid something, perhaps nearly, if not quite, a whole year's rent, for he had the beneficial occupation since the first of April, and he had harvested the crops which were sown before his time, and had had the use of the fall ploughing done in 1878. The amount to be paid would have been a proper subject for the arbitration he once asked for. Thus, all we hear about the rent, and notably the demand of it before the 15th November, are quite as consistent with the termination of the tenancy in August or September, as with its continuance after those dates. Still, the evidence is available for the plaintiff for what it is worth. Then there is the fact that the defendant does not shew that anything was done or agreed to by him to disable him from insisting at any time on his right to resume possession. There is also the indication that, at all events, an agreement either express or tacit exists by which the tenancy did not extend beyond the end of the first year ; making it not unreasonable to sur-

that the parties may have understood that it was to continue up to the end of the first year and then to cease; in which case it was proper that the landlord should receive the farm with fall crops in the ground and fall-ploughing.

Having regard to this aspect of the evidence, whatever force may be, and inasmuch as the view which commands itself to me is not that which is taken by all the members of the Court, I shall concur in dismissing the appeal.

I am not dissatisfied with this result, because I agree with the learned Judge that the justice of the case is with the plaintiff, and that the question of his recovering or not to recover, would probably depend only on the form of his action. A count for use and occupation might be added if necessary, although not asked for at the trial; the necessity for it is obviated by the present judgment. The respondent, of course, should have his costs of the trial.

MURTON, J. A.—I agree with my brother Patterson that taking possession, ploughing and sowing in September, 1891, were acts entirely inconsistent with the tenant's particular estate. The landlord may have thought that as the tenant had left, it was the most prudent thing he could do, but he was a trespasser unless the term was at an end, and it does not lie in his mouth to say that he did so merely for the purpose of preserving the property for the benefit of whom it might concern. Acts of this kind are very distinguishable from such acts as are referred to in *Oastler v. Henderson*, and cases of that kind, and we can quite understand that in the case suggested by the Chief Justice, the landlord would not lose his right to recover his rent because he entered and replaced a roof destroyed by storm or fire, such a course would be necessary in order to preserve the property.

There are several such cases to be found in the books, for instance as putting a person in possession to pre-

vent depredations, putting a bill in the window for the purpose of letting the premises, or lighting fires in the rooms, and so on, but where the tenant leaves before the expiry of the term, and the landlord relets to another tenant who occupies, such letting constitutes an eviction, and in such a case the landlord is not entitled to recover even for the period intervening between the quitting of the premises and the reletting of them by the landlord, and the same result will follow where the tenant has left the premises and the landlord enters and is in profitable occupation of them: *Hall v. Burgess*, 5 B. & C. 332.

An actual bodily expulsion of the tenant from the land is not necessary to constitute an eviction, a mere trespass and nothing more is not sufficient; if the tenant loses the benefit of the enjoyment of the demised premises by the act of the landlord, the rent is thereby suspended.

I admit that the entry must be with the intention of depriving the tenant of the enjoyment of the premises as demised, and that whether such intention does or does not exist, is a question for the jury.

I inclined to think at the hearing, and I adhere to that opinion, that if the case of the defendant had been put upon that ground, the beneficial occupation of the landlord might well have been held to have had the effect of an eviction, in suspending the rent during the continuance of that occupation at least, but there is no such defence raised on the record.

I think, with the learned Chief Justice, that there was no sufficient evidence of an agreement on which to found a surrender, but at all events we cannot say, if it was by the consent of parties left to the Judge to find the fact, that the conclusion he arrived at was a wrong one.

I concur, therefore, with the other members of the Court in dismissing the appeal.

WORKMAN ET AL. V. ROBB ET AL.

of Limitations—Entry—Receipt of profits—Improvements in lieu of rent—Right of creditors.

1867 permitted the defendant L. to occupy certain lands upon an agreed agreement that in lieu of rent he should make improvements, such as were required for L.'s trade, but not defined as to extent or time, of which R. would obtain the benefit, and that L. would give up possession whenever R. required it—there being no agreement for any term. R. between 1867 and 1879 went occasionally on the place and made with L. about the improvements, telling him to make such improvements as he chose. In 1879 after L. had become financially embarrassed he restored the possession of the premises to R.

[BURTON, J. A., dissenting,] that L. could not have set up a title under the Statute of Limitations; nor could the plaintiffs, his creditors, claim the land as having been so acquired by him.

SPRAGGE, C. J., and OSLER, J.—The entries of R. in going upon the land, were sufficient to prevent the statute from running; and *per SPRAGGE, C. J.*, R. might be said to have been in receipt of the "profits" of the land, through its increase in value by reason of the improvements. PATTERSON, J. A.—The evidence shewed that by the successive improvements made as they were, the relation of landlord and tenant was continued or created anew, even though the improvements to be made were not strictly in lieu of rent, nor could be treated as profits of the land.

BURTON, J. A.—L. upon the evidence entered as tenant at will; there was no receipt of "profits" within the meaning of the statute; and no entry inconsistent with the lessee's title; and L. having acquired a title to possession the land was liable for his debts. BURTON, J. A. had acquired a title under the statute, his giving up possession again to R. would not re-vest the estate.

THIS was an appeal by the plaintiffs from a decree of the Court of Chancery pronounced by Proudfoot, V.C., in the report of which (28 Gr. 243) the facts giving rise to the suit appear. The appeal came on to be heard before the Court on the 16th of February, 1882.*

ROSS, Q.C., and FITCH, for the appellants, contended that the evidence in the cause shewed clearly that in the year 1867 Samuel Lorimer became the tenant-at-will to the defendant Robb of the premises in question: that since that time he had continued to hold possession without any acknowledgment of the title of Robb, by payment of rent or otherwise, and it was not alleged or pretended on

Present.—SPRAGGE, C.J., BURTON, PATTERSON, JJ.A., and OSLER, J.,
Div.

behalf of the defendants that any new tenancy, express or implied, had ever been created between those parties. Under this state of facts Samuel Lorimer, it was insisted, had acquired an absolute title to the lot by lapse of time: and on this point the learned Vice-Chancellor ought to have found in favour of the plaintiffs. The learned Vice-Chancellor (at p. 248) says: "The plaintiffs are therefore in the position of subsequent creditors, and not claiming any advantage from there being any prior creditors"; but counsel contended that the amount due the plaintiffs had been incurred by Samuel long before the possession of the property had been given up to Robb, and the plaintiffs could not in any sense be deemed or taken to be in the position of subsequent creditors. Counsel also contended that the evidence was not sufficient to support the finding of the Judge that there was an agreement between Robb and S. Lorimer that he should make improvements on the property in lieu of rent; or that any such were made.

S. H. Blake, Q. C., for the respondents. Samuel Lorimer never at any time set up adverse possession as against the right of Robb, or made any claim to be entitled to any rights other than as tenant to Robb, who was and is the duly registered owner of the property, and as such the landlord of the tenant in possession, who never at any time asserted or claimed to have any title to the premises otherwise than as tenant of Robb; consequently the appellants, as creditors of Lorimer, or in any other character, were not entitled to set up any claim adverse to the title of Robb; who, the evidence shews, advanced the money for the purchase of the premises, and having paid for them is entitled to retain them against all claimants.

The authorities cited appear in the report of the case in the Court below.

June 30, 1882. SPRAGGE, C. J.—I think it clear that no case is established against Robb in respect of the dealings between him and Samuel Lorimer, which closed by the conveyance to Robb of the equity of redemption of Lorimer, in 1864.

The plaintiff, if he succeeds at all, must succeed upon Emanuel Lorimer having acquired title by the extinguishment of Robb's title, by reason of his possession after his return from Michigan in 1867, and up to his giving up possession in 1879.

I will assume that his voluntary restoration of the property to Robb, in 1879, though a mere act of common honesty, did not affect any title that he might have acquired. The point was referred to by Sir John Robinson, in *Doe Ausman v. Minthorn*, 3 U. C. R. 428; but in terms it shew, I think, that the learned Chief Justice had nothing in it.

Lorimer's possession was permissive at the start. How it came about is succinctly described in the judgment of Mr. Justice Proudfoot, 28 Gr. 243; and if it had continued without practical assertion of right by Robb, and without the rendering by Lorimer of rent or profit to Robb, there would have been, I apprehend, an extinction of the title of Robb.

The case of *Day v. Day*, L. R. 3 P. C. 751, in the Privy Council, the Court of last resort from our Courts, and therefore of the highest authority, has been referred to as governing this case. There are some points of resemblance, but the principles upon which that case was decided, as it appears to me, essentially different from the principles applying to this case. The case is largely quoted in by Mr. Justice Gwynne, in his elaborate and lucid summary of authorities in *Keffer v. Keffer*, 27 C. P. 257, 259. As the Common Pleas Reports are of easy access, I shall content myself with a much shorter reference to the case.

In *Day v. Day*, then, the father being the owner of a house and of premises in which he carried on his business, "gave over," as the judgment terms it, the property and business, (but not by any conveyance), to his son, of the same name; and went and resided elsewhere. This was in May, 1842, and the son continued in possession, without payment of rent in any shape, without the father deriving any profit

in any way from the premises, and without assertion of right by act or word on his part, until the death of the son, in 1864. His widow, devisee for life under his will, brought ejectment against parties claiming under a will made by the father, who in 1867 procured attornment from the tenants on the property, to whom the son had let portions of it.

The title of the father had clearly been extinguished by the possession of the son, unless certain circumstances relied upon by the defendants operated to determine the tenancy of the son, and to give a new *terminus a quo* for the running of the statute. The circumstances relied upon, which I take from the judgment, were, that at various dates, commencing in or about 1852, the son let portions of the property in dispute on yearly and weekly terms, and received rent for the same, and transferred, or purported to transfer part of the land to his brother William, who let and received rent for the same, of which letting and transfer the father had notice at the times at which they took place respectively; and it was contended that as the portion of the land sought to be recovered continued to be, to the knowledge and with the sanction of the father, in the occupation of the son, or of tenants paying rents to him, until his death in 1864, these facts amounted to a determination of the original tenancy at will created in May, 1842, and to the creation of a fresh tenancy; so that the Statute of Limitations commenced to run in favour of the son only from such determination. Of the acts thus relied upon by the defendants, the Court said this:

"The acts on which they relied, in order to shew that the original tenancy was so determined, were consistent with the character of the occupation confided to Thomas, the son, and were beneficial to the property. It seems difficult to conclude that acts which were conformable, (not contrary), to his father's will, which had his sanction, and so far were authorized, not wrongful, should have determined the tenancy at will."

It is true that a portion of this language is applicable to what was done in the case before us; but there is a

marked distinction between what was done in that case and in this. In *Day v. Day*, the son let portions of the property and received rents, and transferred another portion, and did all this as owner; the father, who had made over the property to him, simply not interfering with his dealing with it. If he had interfered it would have been an interference not consistent with the relation, as well understood by the parties, which subsisted between them. By law, as put by the Court, the son was tenant at will of his father for the first year after his father had placed him in possession, and after that tenant at sufferance. The statute commenced to run at the end of the first year, and it was put by the Court there was nothing to impede its running for more than twenty years thereafter. A question was put by the Chief Justice at the trial to the jury, is spoken of approvingly by Sir Joseph Napier in the Privy Council, : "Whether with the knowledge of the acts done by Thomas the son, a new authority to occupy was given by Thomas the father, and this was answered in the negative," no doubt was properly so answered.

It is to be observed that in *Day v. Day* all the acts of the son were acts of pure ownership, for which he was to account to no one; and that he alone, and not the father, was, in the present and in the future, to have whatever benefit accrued from them. We may properly, I think, look at all these circumstances, because they help to indicate the character of the acts themselves. Those acts may be what the law calls a determination of the will of the owner, a restoration of possession to him, an assertion of title by him; or they may be none of these, according to the circumstances under which and the intent with which they are done.

Turning to the evidence given in this case, we find that what was done by Lorimer, the tenant in possession, was clearly by the agreement of the parties, and, unless the effect of the statute prevails, as clearly in fact, for the benefit of the owner Robb, as in *Day v. Day* what was done was intended to be and was in fact for the benefit of the ten-

ant in possession. Proudfoot, J., in his judgment, 28 Gr., at p. 247, states it shortly thus:

"At the hearing the evidence satisfactorily established that Robb was originally a mortgagee of Samuel Lorimer, to secure money advanced to pay the purchase money of the property; that he became a creditor to a considerable amount afterwards, and that in 1864 the equity of redemption was released to him in satisfaction of the indebtedness; that it was a fair transaction for a reasonable price; that Samuel immediately went to Michigan, and on his return, in 1867, found that the result of testing for oil was to produce a stream of water that might be utilized for the driving of machinery in his business as a carpenter and builder; that the overflow of water had rendered the ground marshy, and it would have to be drained; that he applied to Robb for leave to occupy these premises, which was granted. He was to improve the place—the rent was to be paid in improvements. He was to give up the place whenever Robb wanted it. He built a dam and tail-race. After this he put up a work-shop and made several additions—enlarged four times, the last in 1879. The improvements have cost \$500, which would be a fair rent; and they were all made after consultation with the landlord."

I will read only a few out of many passages in the evidence in support of the same view.

Lorimer, after stating what he was to do in the way of improvements, says, in answer to the question:

"What was he going to have the improvements for? A. For the rent of the place. Q. Was there any other rent fixed? A. No other agreement made. Q. Did you do anything else to the building after that? A. I put up several additions to the shop. Q. When was the last one made? A. In '79. Q. When before that; the second last? A. There were four; it was done at four different times. There was just about a year, or maybe rather more, just as we found it was too small. Q. You put a dry kiln on? A. Yes. Q. When was that? A. I believe about '79. Q. In a general way what did the whole cost? A. I think all frame, just rough work. Q. Done by yourself? A. Done by myself; I suppose the whole would be five hundred dollars. Q. During that period you have mentioned? A. Yes? Q. Would that be a reasonable rent for the place during that period? A. Yes, I think it would be. Q. Now would you make these improvements of your own accord, or without consulting the old gentleman, or how would that be? A. No, I made no changes unless Mr. Robb was notified or told, and he was satisfied that I should make improvements for myself. Q. How do you know he was satisfied? A. Well, he

made any objections, but told me to make them when I told him was going to do. Q. Then I understood you to say just now that we never made any material change or alterations without notifying him, and that things went on in that way until

A. Till end of October or November '79. Q. What was the then? A. I was going to come to Brantford. I had done a job and was intending to move into Brantford, so I told them I wouldn't any longer and he said he would take it off my hands. * * *

Q. I say you were to go on there and put up such buildings as necessary? A. Yes. Q. Whatever you thought necessary. A. Yes; I consulted Mr. Robb all the time; everything that was done. Q. Mr. Robb doesn't say so. You will swear to it? A. I think there was nothing that I am aware of; that I remember of; I think that was all I remember of. There was only one chimney that was put on that

Q. Mr. Robb lived in the village? A. He did. Q. And saw him going on there? A. Yes. Q. Do you swear that before you made any other repairs or improvements you went to consult him about it? A. Yes. I never put up a thing but what I told Mr. Robb about it. Q. You expect him to object to it? I told him if the place was his, my place to let him know. Q. Did you go there expecting him to object to it? A. I didn't know whether or not. Q. You are prepared to swear although he won't, that you consulted him about these repairs before you put them up? A. I told him every time. Q. Did you consult him? A. Yes, I told him that I was going to do so, and he said I could do what I could."

It is confirmed by the evidence of Robb himself.

Then he went into possession and improved it; what did he do with it? A. He put up a workshop on it—four times; he built it up. Q. In large pieces from time to time? A. Yes. Q. Along up

A. Yes. Q. Would he do this against your will, or without your consent? A. I knowed perfectly what he was doing. Q. How did you know it? A. I was there once in a while. Q. Anything said between you and him about that? A. Nothing particular. Q. What about rent? There was no rent mentioned; he was to improve it? Q. What was he to improve it for; his benefit or yours? A. He told me he would give me any time I liked. Q. Did you ever claim it as your own? A. He told me I could have it when I liked. Q. Can you say what he was doing these things for? A. It was to have the improvements off the place; he wouldn't do nothing with it. Q. Who was to have the improvements on the place? A. Me; I was to get it. He told me he would give me the place up at any time. Q. Who was to have the improvements? A. I was to get them. Q. You were to go on and work the shop, weren't you? A. I couldn't work the shop. They were to work the shop. Q. Were there any arrangements about that between you and them. Was there any understanding between you? A. I don't say there was, but I

told him to go on and improve it for I could do nothing with it. Q. Well now, you say you knew from time to time when he made improvements. A. Yes. Q. Would he make improvements without consulting you or with consulting you, or how would that be? A. I knew what he was doing. He didn't do anything but what I knew of it. Q. When was the place burnt down? B. It is long ago; fifteen or sixteen years. * * Q. Was he occupying for nothing: was he to occupy for nothing? A. For improvements; he was to improve it. Q. You were to get the improvements you say, whenever he gave it up. A. He told me he would give it to me any time. * * Q. Before he went into possession, did he talk to you about it, and ask you to leave? A. Yes; we had talked backwards and forwards about it. Q. You understood what he was to do? A. Yes, he improved the place a good deal more than I could for the rent. Q. You say he never claimed it as his own, but always said he would give it to you when you wanted it. A. Never claimed it. Q. From what period on? A. Whenever I wanted the place I could have it. Q. That he told you frequently during that time? A. Yes."

And it appears that in 1877, part of the lumber, for additions to buildings put up, was furnished by Robb.

Any intelligent person outside of the profession, would scout as preposterous the idea that what was done by the son in *Day v. Day*, could reasonably be interpreted as interfering with his continued tenancy, or that the acquiescence of the father could have that effect; and the like person would on the other hand scout the idea of a continued independent holding in this case by Lorimer, looking at the continued dealing between them in relation to this land. We must, however, take the law as our guide in the decision of this case, even though its application may in some cases shock the common sense ideas of such a person as I have described. Still what Erle, C. J., in *Locke v. Matthews*, 13 C.B.N. S. 731, calls a gross perversion of the statute from the intent with which it was passed, should not be suffered to prevail if it can in law and reason be avoided.

I do not propose to go through the cases reviewed in *Keffer v. Keffer*. They clearly establish this, that where there has been a going upon the land by the owner which in strict law would be a trespass if not lawful, be it for ever so short a time, the law will regard it as in

tion of the owner's right ; and as a determination of tenancy at will, or at sufferance, as the case may be ; if the tenant remain still upon the land it will be held as the creation of a new tenancy from which, not from its original creation, or from a year after it, statute will run.

There is no doubt upon the evidence that Robb died testately between 1867 and 1879, and up to the latter year went upon the land as owner, and consult with Lorimer did not direct him as to what was to be done in the way of improvements upon the land. For the law upon this point, I need only refer to a passage in the judgment of Lord Denman, in the Exchequer Chamber in *Poe v. Bennett*, 9 M. & W. 643 :

"The intent of an entry is undoubtedly in many cases important, but in the case of a tenancy at will, whatever be the intent of the landlord, if he do any act upon the land for which he would otherwise be liable to an action of trespass at the suit of the tenant, such act is a determination of the will, for so only can it be a lawful and not a wrongful act." Or, as it is put in another case, every time the owner puts his foot upon the land. It can make no difference whether Lorimer was tenant at will or at sufferance, for his mere possession would make the entry of another, without better title, a trespasser: *Asher v. White*, L. R. 1 Q. B. 1.

Some passages in the judgment in *Groves v. Groves*, L. R. 1 Q. B. 486, are apposite to the relations and dealings of Robb and Lorimer. I will quote two of them. Patteson, J., says, page 490 : "Here the defendant's title rests wholly on the Statute of Limitations; and his acts may amount to an admission, that during the period in question he was in fact tenant to another."

Lord Justice, J., says : "The question is, whether the estate of the plaintiff at-law is defeated by certain acts *in pais*, relied upon by the defendant. The lessor of the plaintiff was clearly entitled, and his title recognized in the plainest way by the defendant. But the defendant's answer is, that he acted as apparent owner for twenty years. To this the plaintiff says, that the real owner came now and then and lived

with him. If I had been in the place of the jury, I should have held that this shewed that the defendant was in reality tenant at will."

The admission by acts spoken of by one learned Judge, and plain recognition of title spoken of by the other, were not nearly so distinct and unequivocal in that case, as they are in this.

I think further that this case comes within that part of section 5 of "The Real Property Limitations' Act," which provides that the right to make an entry shall be deemed to have first accrued at the last time at which any profits or rent of the land in question has been received. The agreement was in some respects a peculiar one; in other respects not an unusual one. It has, however, these elements: The owner of land puts a person into possession, the person put into possession agreeing with the owner to hold the land from him, and to place upon the land a certain building, and to make upon it other improvements, and that the same should be in lieu of a money payment of rent, and that upon his leaving the land this building and other improvements should be left thereupon, and be and remain with the land the property of the owner. In this case there was no definite term for which the party put in possession was to have the land, nor was the value of the improvements fixed, nor the time when they were to be made. The parties appear to have had great confidence in each other. The owner was to be at liberty to resume possession whenever he pleased, and the improvements were to be of a certain character; some defined, though not very clearly at first, and others from time to time as proposed by the one and assented to by the other. The party put into possession and holding the land from the owner stood to him in the relation of tenant, and the owner of the land stood to his tenant in the relation of landlord. I think this must have been the relation of the parties so far. Lorimer understood that he was paying rent and Robb understood that he was receiving rent, or an equivalent for rent; and unquestionably Lorimer was to

and did give a valuable consideration for that which received from Robb. Whether it was rent in the legal meaning of the term, or within the meaning of the statute, is another question, and one which I think it is not necessary to decide, because if what was done by Lorimer on his land was a profit received by Robb, it is brought within the terms of the Statute.

There is no necessity for restricting the word "profits" to a practical return from the land; though that is its most ordinary signification. In a wider sense it means, according to the Imperial Dictionary, "any advantage, any access to good from labour or exertion." In that sense Robb received profit every time that a building or addition to a building was placed upon his land. The statute does not specify in what shape the profit is to be received. In the case before us, it was received in a very practical shape, viz., the rendering of the annual value of the land from, say, £100 to \$100. This was the sum at which it was let to the younger Lorimer; and it was the right of Robb at the end of the term during the tenancy of the elder Lorimer to realize the profit, to bring a profit literally into his hands, by evicting his tenant and letting the land to another. He did not do so; but probably did what was better for his own interest and profit, by leaving his tenant from time to time throughout his tenancy to enhance the value of the land by making one improvement to another upon it, each improvement being a profit to the owner of the land.

Each party to this agreement evidently regarded it in that light. Lorimer putting upon the land improvements worth to what it was worth to rent, and Robb accepting the rent; each probably having in his mind the common practice in this country of letting land to a tenant, the tenant to hold for a portion of the term, or it may be for the whole term, and receiving compensation by the making of improvements by his tenant. Such agreements are of course much more definite than was the agreement in this case; and in this case the landlord was sufficiently protected by his power at his will to put an end to the tenancy. The

principle is the same in both cases, the landlord is compensated by the enhanced value of the land ; in that shape he receives his profit for its use by his tenant ; and it is a present profit from time to time, as the selling and rentable value of the land is increased by each improvement as it is made.

For these reasons I think that the title of Robb to the land in question was not extinguished by the possession of it by Lorimer, and that the appeal fails.

BURTON, J.—This case must turn upon the construction and effect to be given to the Statute of Limitations upon the facts in evidence.

It is admitted that Samuel Lorimer entered into possession of the premises in question in 1867 as tenant at will. The defendant, John Robb, admits " that there was no particular agreement as to what he did going on rent for the land," adding, that he could not let him have it for nothing, and that he considered the improvements he made more than equal to the rent.

Reading the whole evidence it is manifest that there was no agreement for rent or the performance of any specific repairs, or work, in lieu of rent, but that the defendant Robb believed that the improvements that were made were sufficient compensation for the use of the property, and that the estate of Samuel Lorimer at the commencement was, at most, a tenancy at will.

I am unable to agree that there is any evidence to sustain the finding that the particular improvements were all made after consultation with the landlord. They were made frequently, no doubt, with his knowledge in terms of the original agreement, and he may occasionally have been consulted in reference to them ; but to hold that anything that subsequently occurred was under a new or distinct agreement, so as to convert what was optional at first into a new agreement to pay rent in work, or constitute a new tenancy, would be, in my view, a perversion of the evidence on both sides.

to such defence is set up or pretended in the answer of the defendant Robb. The tenancy is thus stated to be:

"I told him he could go on and occupy the premises and make such improvements as were necessary, and I would pay him for them; this was, I think in the year 1867. After selling this portion of the said premises to Rymal the residue of the said premises was of little or no value, being swampy, and the flow of the water from the test was required to be drained and utilized to make the premises of value. The said Samuel Lorimer, with my permission, went on and occupied and carried on business thereon, and erected a small shop, in the year 1868, and the following year added thereto and ditched and drained the premises, and afterwards built a drying-kiln to dry lumber thereon. I looked upon him as my tenant at will, during my pleasure."

This is somewhat at variance with his evidence. Here the allegation is, that he, the landlord, would pay for the improvements. The evidence is, that there was no understanding, but that when he required the place Lorimer was to give up possession of the premises, with the improvements upon them, nothing being said about rent or payment for the improvements.

This is what he states about it: Q. Was there any arrangement about that between you and him; was there any understanding between you? A. I don't say there was, but I told him to go on and improve it, for I could do nothing with it. Q. Well now, you say you knew from the time when he made improvements. A. Yea. Q. Could he make improvements without consulting you or without consulting you, or how would that be? A. I knew what he was doing. And again: Q. Was he occupying for anything; was he to occupy for nothing? A. For improvements; he was to improve it. Q. You were to get the improvements, you say, whenever he gave it up? A. He told me he would give it to me at any time; he built a lumber dry-house. Q. What did that dry-house cost? A. I didn't tell.

As to the consultations he was asked: Q. Now, did he ever consult you as to what buildings he should put upon

that place? Did he ever consult you? A. I told him he knowed better what would answer the place than I did. Q. When was that? A. Three or four years ago. Q. You remember now at the time he went in there you told him to go on and fix it as he liked, didn't you? A. I told him he knowed better how to fix it than I did. Q. Was that all that took place between you at the time he went in? To which he answered, after some little fencing, that he could not say.

Upon being asked again whether he was consulted he answered: A. I don't know what you call a consultation. Q. Did he ever ask your advice about what he put up? A. I knowed what he was going to put up, but I didn't know whether it was right or wrong, Q. Did he ask your advice about it? A. I don't know whether he did or not; I don't recollect whether he did or not; just that he knowed better to fix it than I did. Q. Did he come to you before he put up those buildings and ask you to give him leave to put them up? A. When he put the first of them up I had the deed of it. Q. Did he come then to you before he put up those buildings and ask your leave to put them up? A. I couldn't tell you; I told him just to put up the buildings; he was at liberty to put them up. Q. He didn't come then to you to ask your liberty—your leave to put them up? A. I don't know whether he did or not. Q. You wouldn't swear that he did? A. Nor that he didn't. Q. You recollect when you were examined before the Judge, don't you? A. I do. Q. I suppose what you said there was true? A. As near as I could bring it. Q. Is this true: "I told him if he could improve the place to do so, as I could do nothing with it?" A. Something just that way. Q. "This was the only arrangement made with him before he built the factory," is that true? A. That is as near true as I can think of it. Q. That was the only arrangement made with him?

Robb's right to bring an action to recover possession of the land must, therefore, be deemed to have first accrued at latest in 1868, when the tenancy at will, under which the occupation began, must for the purposes of the statute be deemed to have determined.

Has anything since occurred up to the time when Samuel Lorimer gave possession to his son in 1879, to alter the nature of the tenancy which, since 1868, for

purpose of the statute, has been a tenancy at suffer-
 ?

payment of rent within the twenty-one years from the
 nal taking of possession might have had the effect of
 ng the statute running afresh, as affording evidence
 the original tenancy at will without any rent reserved
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 erial whether the payment was made in money or in
 ; but it would be necessary to be shewn that it was
 e as rent reserved.

is quaintly expressed in Coke upon Littleton, 142 a,
 t rent may as well be in delivery of hens, capons, roses,
 res, horses, shafts, hawkes, pepper, comine, wheat, or
 r profit that lieth in render, office, attendance, and
 like, as in payment of money, and that for these
 gs there maybe a distress;" and in accordance with
 doctrine, it has been held under the English Act,
 h is, however, wider than ours, that the service of
 ing the parish church was a rent within secs. 2 and 8
 ne Imperial Statute 3 & 4 Wm. IV. ch. 27; whilst
 as been held otherwise for services for neglect of
 h a distress cannot be made, such as keeping in repair
 rish grindstone: *Doe Robinson v. Hinds*, 2 Moo. &
 41.

the present case, it is clear that there was no rent
 rved originally, although the tenant was to be at liberty
 ut up what he desired for his business: and giving the
 st effect to the evidence offered on the part of the
 ndants, it amounts to nothing more than this, that the
 ular repairs referred to, or some of them, were made
 the sanction and approval of Robb; but they are all
 rable to the original understanding, under which Lori-
 went into possession; they were in this sense optional,
 the landlord had no means of enforcing them; he
 nt have put an end to the tenancy, but so he might the
 or the moment after the repairs so approved of were
 pleted.

I think that it has not been shewn that there was any determination of the original tenancy, (except for the purposes of the statute) either by the act of the parties or by operation of law, and that the mere approval of the repairs, which under the original understanding were to be made, which in the case of a mere trespasser might have the effect of converting him into a tenant at will, cannot have the effect of stopping the running of the statute.

I adhere therefore in this respect to the opinion I expressed in *Ryan v. Ryan*, 4 A. R. 563, although it is possible that in doing so I may be deciding contrary to the judgment of the Supreme Court, who reversed the decision arrived at in the Court below.

If so I but express the regret, so generally felt throughout the Province by parties affected by the decisions of that Court, of the tardiness of the publication of their Reports, and the inability, therefore, of the Provincial Courts to ascertain the grounds upon which those decisions are based.

I find myself unable to concur in the opinion expressed by the learned Chief Justice of this Court, that this case is brought within section 5, which limits the time within which an action may be brought to twenty years from the last time when any rent payable in respect of the tenancy was received.

In the first place, the word profits is not to be found in this portion of the section; it must be rent, although, as I have indicated above, that rent need not necessarily be reserved in money; but it is clear that the words "profits of land," do not in this Act mean rent reserved, for tenants at will, tenants from year to year without leases in writing, and tenants under leases in writing, are all themselves spoken of "as such tenants in possession or in receipt of the profits." But as stated by Lord St. Leonards, in his Real Property Statutes, when the person spoken of is referred to as being in receipt of the profits, it does not mean in receipt as landlord of the rent payable by an

ual occupier, but is intended to provide for cases where the owner receives the proceeds, although he may not be occupying the land in person, as for instance in a case where he does not live on the estate, but farms it by a lease.

I do not for a moment dispute the position that an act by the landlord *animo possidendi* would be sufficient to terminate the tenancy at will, and that any act of ownership by the landlord on the land which is not done at the time must have the same effect, but the act spoken of in the evidence here was not of that character. The landlord did not enter for the purpose of taking possession, nor was it or what was said or done at the time in the slightest degree inconsistent with the tenant's title, there was, therefore, in my opinion, no evidence whatever of the determination of the original tenancy at will, which alone would not have been sufficient unless followed by the creation of a fresh tenancy of some kind.

But the learned Judge below held that the tenant was bound to take advantage of the statute, and in that I agree, with this qualification, that his omission to act until the expiration of the statutory period rendered a reconveyance necessary.

The case of *Sanders v. Sanders* was referred to by the learned Vice-Chancellor as apparently upholding that view, but cannot be accepted as a true exposition of the law, although Vice-Chancellor Malins did expressly so hold in his judgment, (29 W. R. 413):

"Where the statute," he says, "has run in favour of one party, and he in whose favour it has run chooses to disavow the benefit, the benefit is at an end. It is a bar for those who desire it to be a bar, and for no others."

The decision, although afterwards affirmed in appeal, was on other grounds—the Lords Justices expressly holding that an acknowledgment after the title has once gone, cannot re-vest that title in the former owner; that the title is extinguished, and although not transferred by the

statute to the person who has been in possession, yet the title gained by that possession is commensurate with the interest which the rightful owner has lost by the operation of the statute, and can only be re-vested in him by a conveyance.

I am of opinion, therefore, that the title to this land had, by virtue of the Statute of Limitations, become vested in the debtor, and was liable to the payment of his debts; and that this appeal should consequently be allowed, and a decree made in the terms of the prayer of the bill.

Since writing this judgment, the report containing the decision in *Ryan v. Ryan*, 5 S. C. 387, has arrived. It does not affect this case, and I do not think it necessary to expunge that portion of what I have written which refers to the tardiness of the publication of those Reports, as it may possibly come to the notice of those who can remedy the evil, and may not at present be aware of its existence.

PATTERSON, J. A.—I agree with the learned Vice-Chancellor, and with the other members of this Court, that the transaction by which, in 1864, the defendant Robb became owner of the land, by mortgage and release of the equity of redemption from Samuel Lorimer, has not been successfully impeached.

I am also of opinion that the Vice-Chancellor was right in holding that the land did not again become the property of Samuel Lorimer, or liable to execution for his debts.

The evidence seems to me to fully sustain the findings of fact upon which the judgment proceeds. The material facts, as I gather them from the evidence, are that Samuel Lorimer occupied the land by permission of Robb: that he was not to pay rent, *eo nomine*, but was to make improvements necessary for the convenient use of the land for the purposes of his trade, and that Robb was ultimately to have the benefit of these improvements: that the occupation, under this understanding, began in 1867: that Lorimer made improvements to the value in all of some \$500, some of them being made as early as 1868 and 1869, and some

late as 1879, others being made between those dates : at each improvement or addition was made with the knowledge and assent of Robb, and after communication and consultation with him : that there was no agreement for any term, Robb being at liberty to require possession any time, and Lorimer being at liberty to quit when he pleased : that Samuel Lorimer's possession continued until September, 1879, when he removed to Brantford, and Robb made a lease to the defendant James Lorimer.

Under this state of facts, could Samuel Lorimer have asserted against Robb a statutable title, by ten years' possession after the accrual to Robb of a right of entry ?

He was originally tenant at will ; and nothing farther being shewn than his entry in that character in 1867, the tenancy would be deemed to have determined, and the ten years to have begun to run, in 1868 : R. S. O. ch. 108, sec. sub-sec. 7.

The acts shewn, such as consultations with his landlord with reference to improvements to be made from time to time, afford ample admission of his holding by permission ; evidence the continuance of a tenancy at will, or the creation of a new tenancy in case that previously existing had determined.

In *Ryan v. Ryan* 4 A. R. 503, I illustrated at some length my view of the correct application of the statute when acts of this character are done by the tenant, but when the landlord has not, by any act on his part, determined the original tenancy. I shall not repeat what I said in that case. The conclusion at which I arrived was that, in discussing a question such as that which I am now considering, we are bound to give effect to the statute by holding that, after the first year, the relation of landlord and tenant at will ceased, so that no active determination of the will by either landlord or tenant was necessary to be shewn, as preliminary to the creation of a fresh tenancy ; that that, by the effect of the statute, and for all purposes of the statute, no tenancy (except perhaps at sufferance) existing, a tenancy at will would be established by what-

ever act would, in case of a trespasser or tenant at sufferance, have that effect in law.

My view was not concurred in by the other members of the Court, who considered themselves bound by authority to hold that the two incidents must co-exist, viz., a determination of the existing tenancy by something done either by the landlord or tenant, and the creation of a new tenancy. In the Supreme Court, 5 S. C. 387, it was not considered that the statute had run in favour of the tenant. The statement in the reporter's head note is, that it was held that the evidence established the creation of a new tenancy at will within ten years. The judgment of the Court, however, can scarcely be taken as deciding the case upon that ground, or as affirming very expressly the view on which my judgment was principally rested.

The appeal was heard by five Judges. They were all of opinion, as I gather from the judgments reported, that the plaintiff, who was the party by whom the statute was set up, had occupied as caretaker for his father, and not as his father's tenant at will and that therefore the statute never ran in his favour. This ground alone was sufficient for the decision of the case. The other point, though not much discussed, was nevertheless touched upon. Sir William Ritchie, C. J., with whose judgment Fournier and Taschereau, JJ., concurred, held that if the plaintiff was in as tenant at will, he had put an end to the tenancy by acts and conduct in violation of the terms of his holding, viz., by cutting and permitting others to cut timber on the land without the consent or authority of his father; and that the father being cognizant of this and sending his son with authority to put him off the premises had created a new tenancy by permitting him, through his agent, to remain. Henry, J., expressed an opinion to the same effect. Gwynne, J., discussed the question at greater length, and with reference to several decided cases. At one part of his judgment he remarks upon *Doe Perry v. Henderson*, 3 U. C. R. 486, in which it had been held that the mere acknowledgment by the party in possession verbally made, that

whether person was the true owner of the land was not
 sufficient to stop the running of the statute, and goes on
 to say: "But *Doe Perry v. Henderson* does not, nor does
 the case, decide that the verbal acknowledgment by a
 person in possession made to the owner or his agent that the
 relation of landlord and tenant is *then existing* between
 the person in possession and the true owner is not good
 evidence, as against the person making it, of the fact of the
 present existence of the relationship, so as to give a new
 start for the running of the statute, equally as does
 the payment of a sum of money by way of rent, it may be
 the first time several years after the statute had begun to
 run, but before its efflux, which is but an *act* in acknowledg-
 ment of the existing relationship of landlord and tenant."
 I may here remark that the distinction between a mere
 acknowledgment of title, which section 13 of our statute,
 and section 14 of the Imperial statute, 3 and 4 Wm. IV., ch.
 27, require to be in writing, and an admission of an existing
 tenancy under the person whose title is acknowledged,
 seems to have been overlooked by the learned authors of
By and Bosanquet's treatise, when they suggest, p. 258
 that if an admission of the permissive character of the
 occupation were allowed in any way to operate as setting
 the statute running afresh, the provisions of the 14th sec-
 tion as to acknowledgments in writing would be virtually
 rendered to acknowledgments made in any other way.
 I refer to *Ley v. Peter*, 3 H. & N. 101, as seeming to
 grant that proposition. I do not so read that case. On
 the contrary, I take it to be useful for the purpose for
 which I cited it in *Ryan v. Ryan*, viz., to shew that when
 a person is in possession as a mere trespasser, and where, there-
 fore, the statute has always been running in his favour, he
 may, by an agreement or an acknowledgment, which need
 not necessarily be in writing, create the relationship of land-
 lord and tenant between himself and the owner, and
 thereby not only interrupt the running of the statute, but
 postpone it at least a year before its running can recommence.
 In view of the judgments delivered in the Supreme
 Court, and of the fact that the case was not ultimately
 decided upon the view of the statute which governed the

judgment of this Court, I assume that I am not precluded from treating the question as still an open one, and applying to the statute, with reference to the case before us, the same line of reasoning which, in *Ryan v. Ryan* led me to a conclusion different from that arrived at by my learned brothers.

I think there is ample evidence from the dealings of the parties to support the finding that the relation of landlord and tenant was continued, or being, in the view of the statute, determined after the first year, was created anew, without special reference to the effect of the improvements made by Lorimer as a *quasi* payment of rent. Robb was, no doubt, to be remunerated, in the long run, for the use of his land, by receiving it back enhanced in value by the improvements. In this sense the improvements may be said to have been in lieu of rent, and perhaps, in a popular use of the word, may be, without inaccuracy, spoken of as the rent he was to get. But, recollecting that there was nothing definite agreed upon respecting the extent or value of the work to be done, but that it was to be just whatever Lorimer found necessary for his business; and that it was extended from time to time, not because Robb required that to be done, but because it suited Lorimer to extend it, I think we might easily push the analogy between this remuneration and rent farther than the real nature of the transaction or the actual contemplation of the parties themselves would warrant. Nor must we overlook the interpretation clause under which "rent" extends to "all annuities and periodical sums of money charged upon or payable out of any land," a definition which cannot be applied to the advantage which Robb was to derive from what Lorimer might do. In *Doe Edney v. Benham*, 7 Q. B. 976, the services of ringing the church bell at stated hours, and of cleaning the church, were held to be rents within the interpretation clause of the Imperial Act, principally because they were certain and could be distrained for; and moreover that interpretation clause was more comprehensive than ours, declaring that, in that Act, the

word "rent" should extend to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses, &c.)

Neither can Robb be said to have received, or to have stipulated to receive the profits of the land, merely because he was to gain something from Lorimer's use of it by way of increased value added to the land itself; for, as pointed out by *Darby* and *Bosanquet*, pp. 222, 399, by receipt of the profits of land is meant, not the receipt of rent from a tenant, but the receipt by the hands of a bailiff or agent, of the actual profits made by the cultivation or use of the land. This statement they support by reference to the use of the term in sections 7, 8 and 9 of the Imperial Act, (which are followed in our Act by sub-sections 7, 6 and 5, respectively of section 5,) and by reference to Lord St. Leonard's R. P. Stats, p. 47, and to *Grant v. Ellis*, 9 M. & W. 128.

A further reference may be made to our section 14, which represents the Imperial section 35, and declares that "the receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee or any person claiming under him, but subject to the lease, be deemed to be the receipt of the profits of the land, for the purposes of this Act." This enactment distinguishes between the two persons, viz., the tenant who is in actual perception of the profits and the landlord who is not; and prevents the former from setting up against the latter, so long as he pays rent to him, that the latter has been dispossessed or has discontinued the receipt of the profits of the land. *Doe Robertson v. Gardiner*, 12 C. B. 319, deals with this section.

But if we could properly hold that Robb was receiving either rent or profits, as between him and Lorimer, we should not thereby advance the argument as against the operation of the statute; because sub-section 7, which governs the case of a tenant at will, makes no provision for the period of limitation beginning afresh after each payment of rent, as the preceding sub-section does with respect

to tenancies from year to year or other period, without lease in writing. It fixes absolutely the expiration of the year as the date from which the statute is to run.

This circumstance is sometimes alluded to as creating a difficulty or implying an oversight in the framers of the statute (see Sugd. R. P. Stats, p. 53 n. Dar. & Bos. on Lim. 259,) and by way of solution, a rather forced application of section 35 is suggested by the writers to whose work I have once or twice referred.

I see no necessity to resort to means of the kind, and I venture to think that the *casus omissus* appears only in consequence of the treatment of sub-section 7 against which I have contended. Every payment of rent or other return for the use of land is a clear and unmistakable acknowledgment of an existing tenancy. Full effect is given to it by so regarding it, and by construing it as creating, on the principle I have endeavoured to maintain, a new tenancy at will, without requiring any proof of any act done by either landlord or tenant to determine the previous tenancy.

This was the view taken by the learned Vice-Chancellor in the Court below, if I correctly apprehend the effect of his remarks. "If the statute," he said, "is to be held to have determined the original tenancy at the end of a year, then at the time when any new improvement was made by such an arrangement between the parties there was the creation of a new tenancy at will."

In *Banning* on Limitations, p. 139, the same view is hinted at by the author, who says: "Possibly this remarkable difficulty is escaped by the provisions of section 35 of the same Act, or such payment may be a sufficient acknowledgment that the tenant's occupation is permissive." *Hodgson v. Hooper*. 3 E. & E. 149, is referred to,—a case which is certainly an authority in that direction, though not a decision on the very point.

If Lorimer could not set up the statute against Robb, as I think he could not under the circumstances, *a fortiori* it could not be set up by his creditor. It is therefore needless to inquire whether the creditor could insist upon it

en Lorimer neither did not nor intended to do so. I allude to the subject merely for the purpose of saying that I see no reason why any property acquired by a debtor, whether under the Statute of Limitations or otherwise, should not be made exigible for the payment of his debt.

The views on which Sir R. Malins acted in *Sanders v. Sanders*, and which seem to have influenced some observations made by the learned Vice-Chancellor in this case at the close of his judgment, having been since the delivery of that judgment disapproved of by the Court of Appeal, it is sufficient to refer to the judgments delivered as reported in 19 Chy. Div., at p. 373.

I agree that the appeal should be dismissed, with costs.

OSLER, J.—I think that the decree of the learned Judge should be maintained on the ground that the running of the statute in favour of Samuel Lorimer was more than once interrupted during his occupation of the land by the incursions which were from time to time made thereon by Robb, the real owner. The exact dates at which these incursions took place are not specified, but that is not material, as they appear to have been of not unfrequent occurrence during the period between 1867 and 1879; and I think it is fairly made out that, on more than one occasion at least, the improvements which Lorimer had made and was about to make were spoken of and treated, and agreed upon as requiring compensation which was to be made for the use and occupation of the land. Each one of these occasions would constitute a new starting point for the running of the statute, as a new tenancy at will would thereby be created. I am of opinion, therefore, that Lorimer never acquired title to the land in question under the statute, and on this ground the appeal should be dismissed.

I refer to *Groves v. Groves*, 10 Q. B. 486; *Day v. Day*, L. R. 3 P. C. 751; *Keffer v. Keffer*, 27 C. P. 257; *Ryan v. Ryan*, 4 App. R. 563; *Canada Co. v. Douglas*, 27 C. P. 339; *Cooper v. Hamilton*, 45 U. C. R. 502; *Smith v. Keown*, 45 U. C. R. 163.

Appeal dismissed, with costs, BURTON, J.A., dissenting.

HARRIS V. MUDIE.

Ejectment—Statute of Limitations—Constructive possession—Title—Trespass—Actual and visible possession.

The judgment of the Court of Common Pleas (30 C. P. 484) affirmed as regards the rights of the defendant under the Statute of Limitations to that portion of the land of which *actual possession* had been shewn for forty years; but varied by entering judgment for the plaintiff for the rest of the land sued for.

The doctrine of constructive possession has no application in the case of a mere trespasser having no colour of title, and he acquires title under the Statute of Limitations only to such land as he has had actual and visible possession of, by fencing or cultivating, for the requisite period. [CAMERON, J., dissenting.]

Where one of several tenants in common enters and dispossesses a trespasser he is, as regards his co-tenants, in possession simply as any stranger would be; and such possession does not enure to the benefit of his co-tenants. Per CAMERON, J.—The act of one co-tenant in so taking possession would be by virtue of his legal estate, and his so doing would enure to the benefit of his co-tenants; thus giving a fresh starting point for the statute to begin to run against them.

Shepherd v. McCullough, 46 U. C. R. 573, remarked upon, and, as applied to the facts of this case, approved.

THIS was an appeal by the plaintiff from a judgment of the Court of Common Pleas, reported in 30 C. P. 484, discharging a rule *nisi* to set aside the verdict entered for the defendants and to enter a verdict for the plaintiff.

The action was ejectment for lot No. 9 in the first concession of the township of Lansdowne, and was commenced by summons issued by William Harris against David Peck and William Peck, on the 30th June, 1879, both of whom appeared to the writ and defended for the whole lot, claiming title by possession and as tenants of Guy R. Prentiss, the alleged owner.

By an order made in Chambers, on the 18th of April, 1879, it was ordered that the trial should take place in the county of Frontenac. The record was entered for trial at the Chancery sittings held at Kingston on the 22nd day of April, 1879; and at those sittings an order was made by Proudfoot, V. C., postponing the trial till the then next Assizes at Kingston, and directing that Lucretia Prentiss and John Mudie should be made defendants in lieu of the original defendants, David Peck and William Peck.

At the same sittings there was set down for examination of witnesses and hearing a cause in Chancery between

Lucretia H. Prentiss, plaintiff, and Nelson Peck, defendant, wherein the plaintiff therein alleged that she was the owner of the west half of said lot No. 9, and that the defendant in that suit had, since the 7th day of October, 1878, been committing acts of trespass on the said premises, and removing fences therefrom, and she prayed for an injunction restraining such trespass, and for the restoration of such fences, and for other relief.

The defendant by his answer claimed to be in possession as tenant of Edward William Harris, who was the owner of an undivided interest in the said land. Issue was joined upon this answer. That cause was at the same sittings transferred by order of the Vice-Chancellor to the Court of Common Pleas, and the trial postponed till the then next Assizes at Kingston.

Subsequently, and on the 28th of August, 1879, the new defendants Lucretia H. Prentiss and John Mudie, filed their notice of defence, the former claiming under a devise from Guy R. Prentiss, deceased; the latter, by virtue of a conveyance of the property from Alexander Irvine Ross, Sophia Barbara Ross, Annie Elizabeth Ross, and Mary Ann Logie Ross, bearing date the 18th of April, 1878.

Both these defendants claimed title to the premises by length of possession in themselves and those through whom they claimed.

The records in both suits were entered for trial at the Autumn Assizes of 1879, held at Kingston, and both cases were then tried before Patterson, J.A., without a jury; who, on directing a verdict to be entered for the defendants, delivered the judgment printed in the report of the cause in the Court below, (30 C. P. 484,) where the facts of the case and evidence therein are fully stated.

In Michaelmas Term following, and on the 5th of December, 1879, a rule *nisi* was obtained to set aside this verdict and enter a verdict for the plaintiff, which on the 5th of March, 1880, was discharged,

On the 25th of August, 1880, a suggestion was entered of the death of Lucretia H. Prentiss, and that Mudie sur-

vived, wherefore it was directed that no further proceedings should be had against her, and that the action should proceed against Mudie alone.

Subsequently, and on the 2nd of September, 1880, the plaintiff entered his appeal in this Court, which came on for argument on the 17th of that month; and in consequence of the death of Moss, C. J., was again argued on the 15th of November, 1881.*

Bethune, Q. C., and Magee, for the appellant.

MacLennan, Q. C., and G. M. McDonell, for the respondent.

In addition to the cases cited in the Court below, counsel referred to *Young v. Elliott*, 25 U. C. R. 330; *Marshall v. Cook*, 15 Gr. 237; *Lowe v. Morrison*, 14 Gr. 192; *McMaster v. Morrison*, 18 Gr. 138; *Doe dem. McKay v. Furdy*, 6 O. S. 144; *Ryerse v. Teeter*, 44 U. C. R. 8; *Tuthill v. Rogers*, J. & Lat. 81; *Doe dem. McGillis v. McGillivray*, 9 U. C. R. 9; *Culley v. Doe dem. Taylerson*, 11 A. & E. 1008.

June 30, 1882. BURTON, J. A.—The plaintiff at the trial shewed a good paper title to four undivided fifth shares in the land in question; the remaining fifth being held by Lucretia H. Prentiss.

The rights of the parties depend upon the construction which may be given to the Statute of Limitations, and a distinction exists between the title claimed by the plaintiff as to one-fifth and the remaining three-fifths.

The one-fifth share was at and previously to 1843 vested in Lady Stuart, the wife of Sir James Stuart who was tenant by the curtesy initiate, and he at that time threatened proceedings against Landon and Robinson, the persons then in possession; and they took leases from him, presumably of the entire interest in each half of the lot, although the leases themselves are not produced, and no evidence is given of their terms or duration.

Lady Stuart died in 1849, and her husband in 1853, and Sir Charles Stuart, her heir-at-law, became entitled at that time. He took no proceedings whilst so entitled to obtain

* *Present*.—SPRAGGE, C.J., BURTON, PATTERSON, and MORRISON, JJ.A.

session, and seems to have conveyed his interest in 1857 to the persons through whom the plaintiff claims.

Assuming then that the statute only commenced to run against Sir Charles Stuart in 1853, his title would appear to have been extinguished before the commencement of the suit, (30th June, 1876) as his father, claiming in respect of his one-fifth interest under the grantee from the crown, had previously to that time taken possession; and Sir Charles or those claiming through him were entitled only 20 years within which to make an entry or bring an action; and in the present state of the law, I do not see how the entry by his co-tenant Prentiss can avail him.

The question as to the remaining three-fifths presents no difficulties. The effect of section 16 of 4 Wm. IV. c. 1, (C. S. U. C. ch. 88, sec. 1) is to put an end to all questions and discussions whether the possession of land is adverse or not, and if one party has been in actual possession for 20 years, whether adversely or not, the tenant whose original right of entry accrued more than 20 years before bringing the ejectment, is barred by this section.

Had this section stood alone, it would not have varied the right of a tenant in common from what it was at common law, because the possession of one tenant in common does not destroy the possession of the other tenants in common, they could all in contemplation of law be in possession, and the section in question would have no application, but the interests of the tenants in common would have to be determined by the rules of the common law.

But by the 24th section of the same statute, which is to be found as section 13 of the Consolidated Statutes, it is enacted that: "When any one or more of several persons are entitled to any land or rent as co-parceners, joint tenants, or tenants in common, shall have been in the possession or receipt of the entirety, or more than his or their undivided share or shares of such land or of the profits thereof or of such rent, for his or their own benefit, or for the benefit of any other than the person or persons entitled to the other share or shares, such possession or receipt shall not be

deemed to have been the possession or receipt of or by such last mentioned person or persons."

The effect of this section, so far as relates to the object of the Act, is to make the possessions of the tenants in common separate and distinct. The actual possession therefore of one tenant in common is, in point of law, separate from that of his co-tenants not in possession, and the right of the tenant out of possession is, for the purposes of the Act, deemed to have first accrued from the time of the entry of the co-tenant.

This being the position of tenants in common as regards each other how are the rights of these plaintiffs affected by the acts of their co-tenants? In other words, do the entries made in 1843 by Sir James Stuart, and in 1858 by Douglas Prentiss, give a fresh point of departure from which the statute commenced to run.

As regards the shares to which they were respectively entitled they would of course do so, but having regard to the provisions of the statute 4 Wm. IV., I am unable to find any satisfactory reason for giving such an effect to them in the case of the co-tenants. As to them the tenants entering were in the same position as mere strangers.

Mr. Bethune contended that down to 1843, when Sir James Stuart went into possession, the so-called possession of Landon and Robinson consisted of a series of unconnected trespasses; but the learned Judge has found, and there is evidence to support the finding, that on the 30th June, 1836, that is forty years before the commencement of the suit, Landon had cleared and enclosed, and had in his actual occupation, 15 acres of the lot south of the travelled road, and that Robinson had similar occupation of 30 acres, and that there had been continued possession of these portions of the lot.

I do not at present deal with his further finding, that these parties had respectively taken possession of the east, and west halves, or of the portions they actually occupied, with the intention on their part of taking possession of the

ole, and that they exercised such acts of ownership as could ordinarily be exercised by owners of similar lands cutting timber, &c., but without continuously occupying more than the smaller portions enclosed and cultivated; but we have now to deal with the question of possession as found by the Judge, so that the right to make an entry accrued to these plaintiffs or those through whom they claim as far back as 1836.

It is not necessary to speculate as to what would have been the position of these parties had the possession been continuous for the 40 years, and there had been no evidence of knowledge on their part of such possession other than the knowledge possessed by another tenant in common; but if the possession of one tenant in common is not to be regarded as that of the others, it would seem to follow almost as of course that the tenants out of possession could not be affected with notice to their co-tenant. Very nice questions, no doubt, might arise as to the proper construction of sub-sec. 4 of sec. 5, section 17 of the original Act, but they do not, in my view of the case, call for any expression of opinion now.

The view I take of the combined effect of the two sections of the statute to which I have referred is, that one of several tenants in common, one day before the expiration of the 40 years, might make an entry or bring an action which would preserve his right. But I apprehend that on the following day the title of all the other co-tenants would be extinguished.

In 1857, or 1858, when Douglas Prentiss took proceedings, the 40 years had not expired. But if he had proceeded in that suit he would only have been entitled under his *hab. c. poss.* to take possession of one-fifth. The possession of the trespassers in possession would not have been further interfered with, and would have ripened into a title at the expiration of the 40 years. Instead of this, the parties in possession conveyed to Prentiss their interest in the land.

Had a perfect stranger taken such a conveyance he could have relied on the previous possession of those from whom

he purchased. Why should one of several tenants in common be in a different position?

If Sir James Stuart or Mr Douglas Prentiss had turned the persons whom they found there out of possession, and subsequently leased to other tenants, there would have been a break in the possession, giving to the other tenants a fresh point of departure; but on the facts established in this case I think the statute ran against the plaintiff and those through whom he claims since 1836.

I think, therefore, that upon the finding of the learned Judge the defendants have established a title by length of possession to a portion of the land in dispute.

But the finding in favour of the defendants should be confined, in my opinion, strictly to the portions of the land which it has been proved were in the actual possession of those under whom they claim over forty years ago, and which have continued in their possession ever since.

The original taking of possession being wrongful and without colour of right, how can the plaintiff be deprived of more than the defendants have actually cultivated or inclosed? There can in such a case be no constructive possession, for the constructive possession is in the person having the legal title. both cannot be in constructive possession of the same land.

The doctrine of constructive possession can obviously have no application to the case of a trespasser, and it could not be carried out without becoming involved in serious difficulties and absurdities.

If there are three squatters upon a 200 acre lot, each clearing and enclosing an acre or two on separate portions of the lot, are they by length of possession to become absolute and several owners of the portions they have respectively occupied, and tenants in common of the portions over which they have committed depredations by cutting the most valuable timber; or if the portion so cleared happens to be on the corner of four 200 acre lots, and the trespasser roams at will over the whole, and cuts timber from time to time over each, is he to acquire a

to the whole 800 acres? There is neither reason nor force in such a rule, and until recently not even dicta of authority are to be found in support of it, and I think this is the first case in our own Courts in which a judgment has been found in support of such a position.

The rule, as I understand it, has always been to construe the Statutes of Limitations in the very strictest manner, so that it is shewn that the person invoking their aid is a mere trespasser, having no colour of title, and such a construction commends itself to one's sense of right. They were never in fact intended as a means of acquiring title, or as an encouragement to dishonest people to enter the land of others with a view to deprive them of it. See the remarks of the late very learned Chief Justice Gifford in *Doe Shepherd v. Bayley*, 10 U. C. R. 318; and in *Beckett v. Nightingale*, 5. U. C. R. 518. See also the observations of Kinderley, V. C., in *Edmunds v. Wagh*, 11 U. C. R. 1 Eq. 421.

The object of these statutes was altogether different. The policy was, in the interest of the community, not to allow a possession to be questioned after it had been enjoyed for such a length of time as rendered it unreasonable in the eye of the law to require evidence *aliunde* that it was holden under a title derived from some other sufficient source, when such evidence by reason of the lapse of time might not be easily attainable. It never could have been the intention of the Legislature to encourage persons wrongfully to enter on the land of others, although from the frame of the enactment it sometimes appears to protect a possession under a bad title, or none at all; but such operation is, I apprehend, a consequence of the enactment, and not an object of it.

It is sometimes said that it is the only possession of such wild land as is capable. The statement is not accurate, but it is quite possible to enclose wild land; but assume it to be so, does that furnish any satisfactory reason why the owner should be deprived of it by any ideal constructive possession, consisting of occasional acts of trespass?

I proceed to trace the decisions in our own Courts; referring in the first place to those of some eminent Judges in the United States, where under a similar state of things the matter has received very full consideration.

In *Jackson ex dem. Hardenburg v. Shoomaker*, 2 Johns. 230, Kent, C. J., delivered the opinion of the Court as follows: "There must be a real and substantial enclosure, an actual occupancy or *possessio pedis*, which is definite, positive, and notorious, to constitute an adverse possession, when that is the only defence, and to countervail a legal title."

And in the Court of Appeal of Maryland, it was declared that where "one claims by possession alone without shewing any title, he must shew an exclusive possession by enclosure, and his claim cannot extend beyond his enclosure."

To the same effect is a decision of the Supreme Court of the United States reported in 4 Wheaton 223. So in Pennsylvania, one who enters and occupies as a mere trespasser, is confined to the land he encloses and cultivates.

In *Weld v. Scott*, 12 U. C. R. 537, Robinson, C. J., lays down the law in similar terms. "To allow," he says, "the plaintiff to recover on the evidence given, would be contrary to the legal principle constantly upheld and frequently made the ground of decision in this Court, that a person wrongfully in possession of any land belonging to another which is not covered by any title under which he can assume to hold it, gains no right under such possession to more than the land which his actual possession covers. He is confined to what has been called his pedal possession, and even occasional acts of trespass committed by him on other parts of the property will not be taken as extending his actual peaceable possession over such parts. The distinction between such an occupant and another who either shews a right to the whole land or is residing upon and cultivating part of a lot of land, to the whole of which he claims title under conveyances which, if they were valid, would cover the whole, is, that the latter class of occupants are regarded as being constructively in possession of the whole lot covered by those deeds while they are in possession of part, but a mere trespasser's possession is not to be extended in contemplation of law by any such construction."

that very learned Judge uses similar language in deliver-
 judgment in *Doe Rattray v. MacDonnell*, 7 U.C.R. 321.
 I understand the case of *Heyland v. Scott*, 19 C.P. 173,
 which is sometimes referred to as establishing a different
 rule. I should say that case is not open to the construction
 unfrequently placed upon it.

where the defendant claimed under a defective convey-
 ance, and had put a caretaker into possession who was
 expressly authorized to take charge, and went into posses-
 sion, and although he did not at first reside upon it, cleared
 and cultivated a small portion which he never abandoned,
 some time before action built a house upon and resided
 there, and was known by all the neighbours to have it in
 his possession. It was not the case of a trespasser, but that of a
 bona fide claimant under a paper title, though a defective

It is the language of the learned Judge in that case
 in a case where apparently no actual possession was
 shown, in support of his view, which has led to difficulty;
 meaning being, as I imagine, misunderstood; but it is
 only constantly referred to at the bar, as shewing that
 fencing acts of ownership over wild lands is alone suffi-
 cient to divest the title of the true owner, but is cited for
 a position by Mr. Justice Galt in the cases I shall pre-
 sently mention. He says: "If fencing and cultivation can
 constitute a possession, then title to open wood land
 can never be acquired against the true owner."

I do not know that that ought to be regarded as an unmiti-
 gated evil. There is no reason that I am aware of why a
 person who has acquired for a valuable consideration land
 in a state of nature, should be deprived of it, in the manner
 suggested when the laws under which he lives declare
 that unless he has notice that some one else is in actual
 possession his title shall not be barred, unless he is so
 early regardless of his rights as to make no inquiry as to
 the possession for 40 years; and with great deference I
 submit that the proposition that the mere placing of sen-
 tinals to prevent trespassing upon woodland, if meant to
 apply to cases in which no visible or actual possession by

clearing or occupation has been taken of any portion of the lot, would deprive the true owner of his rights is not sustainable even though such acts were continued for 100 instead of 20 years.

In the case, then, under consideration, the party was claiming under a deed of the whole lot. He entered and cultivated a portion claiming the whole; and there was abundant evidence for the jury, that in addition to the cultivation of part he claimed possession under his deed of the whole.

In our Courts of Equity, a similar rule has been adopted. The case of *McKinnon v. Macdonald*, 13 Gr. 152, was a case between vendor and purchaser, who had received possession and paid his purchase money, and it was held to be more reasonable and more in consonance with the authorities that the vendee should be treated as in possession of the whole lot than of the portion in actual occupation, as between him and the vendor.

In *Low v. Morrison*, 14 Gr. 192, the late learned Chancellor VanKoughnet uses an argument very similar to that I have employed in this judgment. He says, at page 195:

"Moreover, the erection of a mill on the corner of a wild lot of land, would not be a possession of the whole lot. Many a man as a squatter or under pretence of right, has availed himself of the advantages which a stream of water affords for driving machinery, and erected a mill there and worked it; but it does not follow that he is thereby in possession of the adjacent 200 or 400 acres, so as to bar a title to them adverse to the true title? On which side of the mill, for instance, is the vacant wild land to be considered as in his possession? Is he to be treated as occupying 200 acres in front or in rear or both, giving him 400 acres in all?"

In *McMaster v. Morrison*, in the same volume, p. 143, Mowat, V. C., says:

"The plaintiff has not shewn that at the early period referred to the testator either had or pretended to have any title to the lot, or that he exercised any acts of ownership on any portion of it except what he cleared; or that he was more than a mere trespasser in respect of

on that portion. Under these circumstances, he cannot, according to the authorities, be held to have been constructively in possession of any part of the lot of which was not in actual possession." Citing *Hunter v. Farr*, U. C. R. 327; *Dundas v. Johnston*, 24 U. C. R. 547; *Long v. Elliott*, 25 U. C. R. 330; *Turley v. Williamson*, C. P. 538.

and the learned Chief Justice of this Court in a case in Grant 237, *Wishart v. Cook*, held that after the lapse of years there could only be title by possession to so much as was actually cleared and occupied.

Now come to the cases in which this doctrine in reference to mere trespassers has been extended.

In the case of *Davis v. Henderson*, 29 U. C. R. 344, I do not quarrel in the slightest degree with the decision; it is the generality of the language of one of the Judges in giving that decision to which I take exception, and which has led to what I humbly conceive to be erroneous decisions in more recent cases. That was the case of a person entering under what proved to be a defective title, and treating the whole as in his possession; and my brother was in error in delivering his judgment is particular in guarding himself against being supposed to hold that a similar result would be arrived at in the case of a mere trespasser.

"I do not think it necessary," he says, "in this case to consider the right of a mere squatter or person whose occupation of land commences without any shadow of right or title to any definite portion or quantity of land. I see a distinction between such occupants and one who goes into possession under a title which is discovered to be defective."

It is the very general language used by the present Chief Justice of the Common Pleas, to which I object, which has been adopted in the case under review, and which, if affirmed as good law has in effect reversed the earlier decisions to which I have referred, which I think are nevertheless sound law founded in justice, and on which the owners of wild land have for half a century been led to rely as a basis of property. The language is this, p. 356:

"In my opinion when any person enters on a lot or half lot, or any defined piece of land, wild or partly cleared and partly wild, under colour of right *or otherwise*, and holds possession for the statutable period, the question for the jury should always be, as to the wild land, whether the person whose possession is in question has claimed or held the wild land, (for there is no misunderstanding as to the cleared land) as owner, and has used it in like manner as the owners of land who have uncleared and unenclosed portions on the lots they occupy usually use their wild lands, by such acts of ownership as owners are accustomed to exercise, or whether the acts of the person in question have been the acts of a mere trespasser, not done and not intended to have been done in the assertion of right, title, or ownership."

Looking at the whole passage I incline to think that the learned Judge did not intend his language to be understood in the very general sense in which it has been regarded by the profession; it is true he uses the words under colour of right *or otherwise*; but when he comes to define the question which he thinks the proper one to submit to a jury, he expressly states it to be whether the person claimed it as owner, or whether the acts of such person were mere trespasses, not done and not intended to be done in the assertion of *right, title, or ownership*, language wholly inapplicable to the case of a person entering as a trespasser without colour of right or title.

As I have said, in the particular case being then decided the party in possession came precisely within the class of persons for whose protection, in my opinion, the Statute of Limitations was passed. A mere squatter, who dishonestly goes upon land of which he knows he is not the owner, upon the chance of defrauding the real owner of his rights, was not certainly intended to be the party benefited by the statute, although he does not unfrequently acquire land in that way as a consequence of the generality of the enactment.

If there be anything contrary to public policy in wild lands being held by proprietors as an investment rather than for settlement, the origin of the evil is to be sought

the mistake on the part of the Government in granting lands otherwise than to actual settlers, and I fail to see that a person who steals land thus situated "has a stronger legal claim to it" than the man who has paid for it, and who is keeping it for his children, and has a right to keep it for any purpose he thinks fit.

The case of *Mulholland v. Conklin*, 22 C. P. 376, adopts the language of the Chief Justice in *Heyland v. Scott*, 19 C. P. 165, and that to which I have just referred in *Henson v. Davis*, and is broad enough to include the case of a mere trespasser. Mr. Justice Galt, who delivered the judgment of the Court, remarking that until the law was declared erroneous by a Court of Appellate jurisdiction must be considered as so established, and that rule has been followed in the case now before us. That was a case, however, in which the claimant was not a mere trespasser, but entered under an agreement to purchase.

There ought, I think, to be no difficulty in confining a mere trespasser to the portions from which he excludes the true owner by his actual residence or occupation, that is, the actual possession which Courts formerly had no great difficulty in defining; the difficulty rather arises in finding a satisfactory reason for enlarging and extending the possession beyond the portion actually and visibly occupied, so as to include the whole land, wild and cultivated, where the person in occupation enters under a defective title.

His entry, although not knowingly or wilfully so, is an invasion of the rights of the true owner, and it strikes me as somewhat contrary to principle that this wrongful possession should be extended by construction to the metes and bounds of the defective paper title to the prejudice of the person who has the legal title. But it has no doubt been established as settled by a long current of authorities as the general rule, that when a party having colour of title enters in good faith upon the land professed to be conveyed, he is presumed to enter according to his title, and thereby gains a constructive possession of the whole land.

embraced in his deed, and the possession so taken may ripen into a title so as to bar the entry of the owner to the whole after the period fixed by the statute. In such a case one of two innocent persons has to suffer, and the entry and possession of a part with acts of ownership of a character to indicate that the claim extended or might extend to the limits of the deed, might well in such case be regarded as notice to the true owner, and the deed be admitted in evidence to define the precise limits of the claim and possession.

Under a good deed his possession would be co-extensive with the boundaries given in the deed, and under one which proves for some reason to be defective, although as against the true owner he is a trespasser, his entry would give him a right to maintain trespass against any one making a subsequent entry without right. But how can that apply to a trespasser entering without color of right? His possession so as to maintain trespass, must be an actual possession. What pretence would there be for his maintaining trespass against a person who had entered and cut timber upon woodland beyond his enclosure?

When a person so enters under a mere mistake as to his rights, purchasing or intending to purchase under what he believes to be a good title as from one whom he believes to be the heir-at-law or devisee under a will, or under a deed from a married woman defectively executed, or a forged deed, there is no good reason why his entry should not, as in the case of a valid deed, be co-extensive with the supposed title, and comes within the class of cases intended, in my opinion, to be protected by the statute; but it must in every case be a *bonâ fide* claim, and ought not lightly to be extended to a purchaser from a squatter or other person having no title, where the party has neglected to ascertain from the registry office, as he can always do in this country, whether the land has been patented, and who is the registered owner; and clearly not to cases where he knows the grantor has no title.

Even in the case of a person claiming under a paper

le defective in fact, but which he supposed to be good, is necessary in order to bar the true owner that he should enter and cultivate some portion of the land. The learned Chief Justice of the Queen's Bench, in the course of the judgment in *Heyland v. Scott*, refers to a case tried at Cornwall, in 1867, where a person claiming under a defective tax title lived close to it, and constantly watched it and guarded it from trespass, using it himself occasionally for cutting timber, from which it is to be inferred that there was no actual possession by residing upon or cultivating any portion of it. But I think that the facts can scarcely be fully stated in that case, as the learned Judge says that the same direction in substance was given to the jury as in the case then before him; one important ingredient in that case and in the charge to the jury being, "that if a person claiming title to a lot send a caretaker to live on and specially to protect the whole from trespassers, and he do so accordingly, that such may be a good legal possession and all so held and protected."

In the case of *Little v. Megquier*, 2 Maine 176, the position of a person so claiming and having exercised acts of ownership without going into occupation is very tersely stated, it having been contended there that though the deed was not admissible as proof of title, it was good evidence to the extent of the claim, the claimant having registered his deed, had the land surveyed, and paid taxes, and it was contended that this was sufficient to bar the plaintiff.

"We cannot," say the Court, "admit the correctness of this reasoning, or the conclusion drawn from it. The principle certainly cannot be applicable, unless in the case where a person claiming title by a deed has entered into possession of the land under his deed, and continued openly to occupy and improve it. In such a case the deed may not convey the legal estate, still the possession of a *part* of the land described in it under a claim of the *whole* by boundaries therein expressed may be considered as a possession of the whole, and as a disseizin of the true owner, and equivalent to an actual and exclusive possession of the whole tract unless controlled by other possession." Such a possession may well come within the protection of

the Statute of Limitations, but I cannot see any good reason for extending their application to a person entering without any shadow of right, and who knew therefore that he was a wrongdoer, however good his intentions may have been in the direction of defrauding the true owner by extending his possession, and that his title ought to be, strictly confined within the portion enclosed or cultivated.

I think that the appeal should be allowed to the extent of varying the verdict and judgment by entering it for the plaintiff as to all the lands embraced in the writ, except those portions which have been found by the learned Judge to have been in the possession of Landon and Robinson, respectively, for over forty years before the commencement of the suit, the costs below to be apportioned as they would have been if the entry had been so made originally, and the appellant to have the costs of this appeal.

I wish merely to add that since writing the above, now some months ago, I have seen the very able and exhaustive judgment of Mr. Justice Armour in the case of *Shepherd v. McCullough*, 46 U. C. R. 573, who has expressed the views which I entertain so much more forcibly than I have done, that I should have refrained from writing much that I have written, had I seen it sooner. I will merely say that I concur in the opinion he has expressed, that the possession of a wrong doer is not to be extended by any implication or constructive possession beyond the limits of his actual occupation. I refer also to *Clark v. Elphinstone*, L. R. 6 App. Cas. 164.

SPRAGGE, C. J.—I entirely concur in the elaborate and learned judgment of my brother Burton. He has gone so fully into the law of the case and supported his views by authorities and reasons, which are to my mind of such cogency, that I feel that I cannot usefully add anything to the judgment which he has delivered. I may add my conviction that any other view of the law would be most mischievous in its consequences, as well as against the current of authority and sound principles of law.

MORRISON, J. A., concurred.

CAMERON, J.—I am of opinion that, unless the entry by Sir James Stuart on the land in question in 1843, and the entry by Douglas Prentiss in 1857 or 1858, stopped the running of the Statute of Limitations, and made a new period from which it would commence, the plaintiff's title has been barred and the judgment of the Court of Common Pleas should be affirmed.

As to the one undivided fifth vested in Lady Stuart, the entry by Sir James Stuart in 1843 and the subsequent cultivation of portions of the lot, took that fifth out of the extended limit created by sect. 3 of ch. 88 Con. Stat. U. C., which is the Act that applies to this case, as the action was commenced before the 1st July, 1876, when the ten years' bar came into force. The question presented as to this fifth differs in some respects from that presented by the statute as to the other three-fifths. As to this fifth, the entry by Sir James Stuart, which must I think be taken to have been made by a person claiming under the original grantee, was not a tortious entry. In 1843, when this entry took place, no part of the paper title was barred, and Sir James Stuart, rightfully by strength of his own title, remained in possession up to the time of his death in 1853, before which time his right as tenant by the courtesy initiate at the time of his entry in 1843 had become absolute by the death of his wife, Lady Stuart, in 1849. Now Sir Charles James Stuart, at his father's death, had acquired as heir-at-law of both his mother and father the right they respectively had in the land. Under his mother he was entitled to an undivided fifth in fee, and if his father, by acquiring the possession of the previous occupants, had acquired any title or right against the tenants in common of the other four-fifths, that right passed to him. The only importance of considering Sir Charles Stuart's position in regard to his father's tenants is to see whether, as far as they are concerned, the legal effect of the position is the same or different. The terms of the holding of these tenants do not appear. All that is known in respect to this

is that in 1843, William Robinson became tenant of the east half of the lot, and Hiram Landon of the other half, and that Robinson was sued for rent in 1851, by Sir James Stuart, and paid the rent, whatever it was, under pressure of that suit.

If the entry then by Sir James Stuart is not to be referred to and limited by his claim to an undivided fifth as representing the right he acquired as tenant by the courtesy under Lady Stuart, he held four undivided fifths, or rather he was in possession of four undivided fifths, by his tenants in his own right, unlimited by and not depending upon his life estate in the other undivided fifth. His tenants would in that case be entitled to hold in accordance with the provisions of the lease till the expiration of the term thereby created as far as the four-fifths are concerned, while they would be as to the other fifth tenants by sufferance, and of course that would be their status also as to the other four fifths if Sir James Stuart's right must be deemed to have been limited by his title or estate in the land ; and though the tenants themselves who took a lease or became tenants under him each of half of the whole lot, might not be permitted to contend as against him and those claiming under him or in remainder that they were only tenants under him of an undivided fifth, he would not necessarily have the same right as against the other tenants in common of the fee.

Assuming then that on the death of Sir James Stuart, his tenants were tenants at sufferance, as they unquestionably were of one fifth—a tenant at sufferance being defined to be one who enters by lawful demise or title, and afterwards wrongfully continues in possession ; as if a tenant *pur autre vie* continues in possession after the death of the *cestui que vie*, (Co. Litt. 57, b)—and they would also be tenants of the other four-fifths in the same way if the terms of their holding had expired, as to which there is no evidence one way or the other.

The next period at which it is necessary to consider the position of the co-tenants, is, when Douglas Pren-

entered; and for the purpose of determining the effect of the Statute of Limitations upon the rights of the several owners, it is unimportant whether that entry took place in 1857, when he brought ejectment, or in 1858, when he demised the whole lot to Charles Landon and William L. Landon for one year. On the 2nd of May, 1857, Sir Charles James Stuart had conveyed his estate in the land to George R. Edwards, and so a right in his grant to enter had accrued before the action of ejectment was brought by Douglas Prentiss to the two Landons last mentioned; and if the statute did not run to extinguish the right till the entry by Douglas Prentiss, then when this action was brought the title was not extinguished, nor the right of the plaintiff to enter or bring an action barred. In 1843, when Sir James Stuart entered into possession of the whole land, he effectually put an end to the previous adverse possession of the trespassers, and made a new point from which the statute began to run. He was fully in possession of an undivided fifth and his tenants could not disturb him; they were, apart from the statute, in possession with him by reason of the consecutive possession they had under their paper title, and their actual possession was their actual possession. They were entitled to an account against him until their right was barred by the lapse of twenty or forty years, according as the circumstances brought the case within the first or third section of chap. 88 Consol. Stat. U. C. Thus when Douglas Prentiss entered in 1857 or 1858, he entered in right, not as a disseisor, at all events of more than the fifth formerly owned by Lady Stuart, as to which the character of that fifth might have treated him as a disseisor; he was not necessarily so, as he did not actually eject the tenants of Sir James Stuart, but purchased from them their right whatever that might have been. At that time, when their term had expired, it was the mere possession that was acquired. Then as against him the holders of the other four-fifths had no right to enter to turn him out; and as against them the possession of the other four-fifths still re-

mained in them, until by an actual possession for twenty years in their co-tenant their constructive possession was destroyed and their title extinguished.

I think, as far as the rights of tenants in common are concerned *inter se*, this is the utmost effect that can be given to the Statute of Limitations. Before the statute there is no doubt the law was as I have stated it, the possession of one tenant in common was the possession of his co-tenant.

In *Peaceable v. Read*, 1 East 574, Lord Kenyon, C. J., said: "*Prima facie* the possession of one tenant in common, is that of another. Every case and dictum in the books is to that effect, but you may shew that one of them has been in possession and received the rents and profits to his own use without account to the other, and that the other has acquiesced in this for such a length of time as may induce a jury, under all the circumstances, to presume an actual ouster of his companions."

The statute provides, sec. 13: "When any one or more of several persons entitled to any land or rent, as coparceners, joint tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons, or any of them."

This has been held where one tenant in common has been in the actual possession of land for twenty years to bar the other co-tenants and to extinguish their title. *Culley v. de dem. Taylerson*, 11 A. & E. 1008; *Woodroffe v. Doe dem. Daniell*, 15 M. & W. 769, 2 H. L. C. 811, are authorities to this effect. In the former, affirming that at common law the possession of one tenant in common was the possession of a co-tenant, it was held the statute

related back to the creation of the tenancy, and so for the purpose of the Act a possession taken by one tenant before the Act, was the separate possession of such tenant. There would seem, therefore, to be no doubt, under the authority of adjudged cases, a tenant in common may be barred by the possession of a co-tenant for the statutable period. But I have not been able to find any case in its circumstances like the present. As far as Lady Stuart's fifth is concerned, her heir Sir Charles James Stuart's grantee was in possession by Sir James Stuart's tenants, who would not have been permitted to deny Sir James's title, or the title of those claiming under him; or rather, the title of the latter being proved, they would not have been allowed to set up any adverse title till they restored the possession obtained from Sir James. It would seem not unreasonable, therefore, that Douglas Prentiss should be held to have entered in respect of his own title, which, being an entry of right, and one that before the statute would have enured to the benefit of the other tenants in common, though now by the statute it is not to be deemed their possession so as to prevent the running of the statute against them, would not, *per se*, be an exclusion of his co-tenants, and so that entry constituted a fresh point from which the running of the statute should be computed. I assume if the land had remained vacant the owners would not have been barred by their neglect to enter for the period of forty years, though at the end of that period some one might have been in the actual possession of the land for a less period than would make the statutable bar.

Under chap. 88 Consol. Stat. U. C. sec. 3, before the passing of 27 & 28 Vict. ch. 27, assuming that tenants in common are not affected by the acts of co-tenants, in other words, that the other tenants were not affected by the entry of Sir James Stuart in 1843, they would have had twenty years in the present case after notice that some one was in possession to bring their action. But now since the passing of 27 & 28 Vict. ch. 27, the entry must

be made or action brought within forty years after possession has been taken by some person not claiming under the grantee of the crown ; and knowledge or notice seems to be of no consequence, and the want of it ineffectual to prevent the statute operating as a bar. In the present case, under the evidence, it is clear there had been an uninterrupted possession of more or less of the land when the action was brought, of fifty-three years.

Clearly then, putting aside for the present the entry by Sir James Stuart, those who held the three other undivided fifths were barred long before this action was brought if possession of a part of the land, for the purpose of the statute was equivalent to possession of the whole ; and it is necessary to consider what is the law in this respect. There is no doubt where a party having title enters upon any part of the land to which his title extends, that entry is not an entry into the part merely entered on, but into the whole land covered by the title of the true owner.

As to this, Draper, C. J., in *Hunter v. Farr*, 23 U. C. R. 327, said :

" If a man has title to a lot of land, though he never entered into the actual possession of it, the law deems him to be in possession till some one else enters adversely to him, not recognizing his title, and so *a fortiori* if he enters and occupies a part."

This being so, had Sir Charles James Stuart or his grantee entered upon any portion of the lot he might have maintained an action of trespass against Sir James Stuart's tenants, for the trespass committed on the portion occupied by them, though not actually entered upon by Sir Charles or his grantee. This may be said is by reason of the title and entry of right ; and the same rule will not and cannot be applied to those who enter of wrong or as trespassers. But by section 16 of ch. 88 Consol. Stat. U. C., it is enacted : " At the determination of the period limited by this Act to any person for making an entry or distress, or bringing any action or suit, the right of such person to the land or rent for the

every whereof such entry, distress, action, or suit respectively, might have been made or brought within such period, shall be extinguished."

There can be no doubt, I assume, that at any time before the entry of Sir James Stuart he might have brought an action to recover from any person then in possession as Vinson and Landon were the whole lot; and if so, full title cannot be given to the clause just cited, without qualifying—if in respect to the circumstances of this case, a time limited for making an entry or bringing an action was determined before this action was brought,—that the plaintiff's title to the whole lot has been extinguished, and not merely the title to the portion which has been in the sole or actual occupation of the person or persons in possession. Let it be supposed that the plaintiff had originally entered upon the land and cleared and occupied one acre, and the defendant had with a strong hand turned him out of the acre on to the road, and had then occupied the land as the plaintiff had been doing, without cultivating more than the acre for twenty years, of what would he have been disseised—only of the, acre or of the whole? And could he after the lapse of twenty years maintain an ejectment for the 199 acres remaining? He was by virtue of his title in possession of the whole lot, and by his intrusion and expulsion he was removed from the whole, and therefore his right to re-enter and to bring an action would exist in respect of the whole, and not of the part merely.

In this Court I am bound to put what I deem to be the true construction upon the statute. Sitting in the Queen's Bench division of the High Court of Justice, I should have followed the decisions of the former Courts of Queen's Bench, Chancery, and Common Pleas, and held that the statutory provision only extended to the land actually occupied by the defendant, a view which would accord most with a natural sense of justice, but does not accord with what I take to be the clear intention of the Legislature in passing the Act under consideration.

In the Common Law Courts in this Province, the effect of section 16 does not appear to have been discussed, at least I find no allusion to it in the judgments delivered in the cases I have examined, and I have read in connection with this appeal all the cases that have been decided upon the effect of an occupation by trespass and without claim of a portion of a lot for the statutable period.

In Chancery it has been considered. In *Low v. Morrison*, 14 Gr. 192, Vankoughnet, C., said at p. 194, as to the effect of this clause and clause 46 :

"I was much struck with Mr. Strong's contention in his very able argument of this case, that here only the remedy and not the right was barred; and that if the party could assert his right by entry without action, he might yet do so unaffected by the Statute 25 Victoria. I leaned much to that view till I came to consider the 16th section of the Consolidated Statutes, which enacts that at 'the determination of the period limited by this Act to any person for bringing any action or suit, the right and title of such person to the land, for the recovery whereof such action might have been brought within such period, shall be extinguished.' Reading the 25 Victoria as abolishing the extended period for bringing an action formerly given to absentees, and as limiting it to twenty years, I must apply the 16th section of the Consolidated Statutes, and hold that after the lapse of twenty years the right and title of the absentees are extinguished."

But notwithstanding this the learned Chancellor held the extinguishment of title extended only to the land in the actual occupation of the wrong doer. As to this, at p. 195, he said :

"Moreover, the erection of a mill on the corner of a wild lot of land would not be a possession of the whole lot. Many a man as a squatter, or under a pretence of right, has availed himself of the advantages which a stream of water affords for driving machinery, and erected a mill there and worked it. But it does not follow from this that he is thereby in possession of the adjacent 200 or 400 acres so as to give a title to them adverse to the true title. On which side of the mill for instance is the vacant wild land to be considered as in his possession? Is he to be treated as occupying 200 acres in front or in rear, or both, giving him 400 acres in all?"

In *McKinnon v. McDonald*, 13 Gr. 152, Mowat, V. C., in pronouncing judgment, said, at p. 156 :

"Now more than twenty years after possession was taken by the McKinnons having expired before the execution of the deed to the plaintiff, the *prima facie* effect of this long possession was to extinguish the title of McGillis and to leave in him no estate to convey to the plaintiff, though the possession not having been for twenty years in either Angus or Alexander, neither may have acquired the legal title which McGillis lost."

With reference to the difficulty suggested by the learned Chancellor Vankoughnet in *Low v. Morrison*, 14 Gr. 192, in determining in which direction from the land in the actual occupation of a squatter this constructive possession, so to speak, is to extend, it appears to me to be more imaginary than real. The statute must be construed in reference to the position of the title to lands in this Province. These lands were at one time vested in the Crown, and the practice of the Crown has been to have large tracts laid out into townships, subdivided into concessions and lots, and to grant the lots as a whole or in parts designated by the number of the lot, or the half, or the quarter of the lot, and concession, sometimes with and sometimes without metes and bounds. If then a lot has been granted to A. B. he is limited in his right of possession to the boundaries of his lot, and one entering upon such lot by title or otherwise would not by such entry and continuing in possession acquire any right to any land outside of the limits of the lot, and assuming that a squatter entered at the corner of four adjoining lots and occupied an acre of each, I see no reason why, if his occupation would give him a title to one lot; if he had entered in the same manner on only one, he should not gain a right to the four. His entry on the four lots would be exactly the same as far as the real owners are concerned, as if four persons had entered each on a separate lot, and made the same clearing. The question is, must the statute be interpreted so as to confine the extinguishment of title to the part actually occupied, or to the whole or so much of the

lot as is covered by the title of the person whose land has been entered on ?

It is not the province of the Court to deal with the morality of this statute, which permits one man without compensation to deprive another of his land. If I yielded to my individual inclination I would not favour a statute of limitations as to real property at all, and certainly not with a less limitation than twenty years. In this country, with our system of registering titles, there are very few instances in which persons buying lands may not learn the true state of the title, and where it cannot be ascertained it might be as well to let the purchaser take the risk as to deprive the true owner of his property. My feeling in this respect is opposed to that of many Judges who deem the Act a most useful one, and as it has had the approval of both the Imperial and Provincial Legislatures, my questioning either its morality or usefulness may well be deemed presumptuous. With that full conviction, I shall endeavour so to construe the Act as will give full effect to the intention of the Legislature, as expressed by the language used in its various clauses, without extending its operation beyond the cases provided for :

By sec. 1, "No person shall make an entry * * or bring an action to recover any land, but within twenty years next after the time at which the right to make such entry or to bring such action shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry * * or to bring such action shall have first accrued to the person bringing the same."

What is the meaning of the words "right to make an entry or bring an action to recover any land." They must mean the right which the owner of the legal estate or title to land has to enter upon the possession of some one else who has entered and is on the land without title or by reason of a weaker title than the true owner, and to exclude such person therefrom by means of such entry or such

ction. A person having the legal title to land is, while there is no actual occupant, held to be in the constructive possession, and is not barred of his right to make an entry or bring an action by the lapse of twenty years or forty years, as the case may be, unless there has been an actual occupation by some person or persons either continuously or at intervals for one period or the other without any interruption or taking possession by the owner. This was held in *Ketchum v. Mighton*, 14 U. C. R. 99, where Draper, J., afterwards Chief Justice, in giving judgment, said :

"The case of *Smith v. Lloyd*, 9 Ex. 562, settles conclusively that the statute in England similar to ours of 4 Wm. V., ch. 1, [Con. Stat. U. C., ch. 88.] does not apply to cases of want of actual possession by the plaintiff, but to cases where he has been out and another in possession for the prescribed time : that there must be both absence of possession by the person who has the right and actual possession by another, whether adverse or not, to be protected, to bring the case within the statute. I must admit I had a contrary impression as to a discontinuance, but the judgment of the Court gives no countenance to any such distinction."

In *Doe dem. Carter v. Barnard*, 13 Q. B. 945, it was said by Patteson, J., where the lessor of the plaintiff, who had been in possession of land for thirteen years, her husband having had eighteen years previous possession :

"If she (the lessor of the plaintiff,) had been defendant, no doubt the non-possession of the lessor of the plaintiff, evidenced by her husband's and her own consecutive possession for more than twenty years, would have entitled her to the verdict on the words of the second section of the Act, without the aid of the 34th section. Therefore, it is said that the 34th section (our 16th) must have some further meaning, and must transfer the right. Probably that would be so if the same person, or several persons claiming one from the other by descent, will, or conveyance, had been in possession for twenty years. But her lessor of the plaintiff shewed nothing to connect her possession with that of her husband by right of any sort ; and if she be right in her construction of the 34th section, the same consequence would follow if twenty persons unconnected with each other had been

in possession, each for one year, consecutively for twenty years; yet it would be impossible to say to which of the twenty persons the 34th section has transferred the title. Without the aid of this statute twenty years' possession gave a *prima facie* title against every one, and a complete title against a wrong-doer who could not shew any right, even if such wrong-doer had been in possession many years, provided they were less than twenty: *Doe dem. Harding v. Cooke*, 7 Bing. 346; and the effect of the 34th section would probably be to give the right to the possessor for twenty years even against the party in whom the legal estate formerly was, and but for the Act would still be, where he had not obtained the possession till after the twenty years; but then we apprehend, as before stated, that such twenty years' possession must be either by the same person or several persons claiming one from the other, which is not the case here."

In *Kipp v. The Incorporated Synod of the Diocese of Toronto*, 33 U. C. R. 220, Richards, C. J., after referring to the above case, said:

"The law seems to be well settled that the real owner, who has been out of possession for twenty years and more continuously, cannot maintain ejectment though no one of the occupants for portions of the twenty years may have obtained a statutory title."

There would thus seem to be no doubt upon the authorities in England and this country, that where lands have been out of the possession of the true owner, and in the possession of another person, or succession of other persons, whether claiming in privity or not, the true owner is disabled from making an entry or bringing an action to recover the land. This seems to be clear law where the person in possession is one who may, by the action, be turned out of possession by the true owner. The question is, whether the circumstances in this case make any exception to the law, and do tenants in common stand towards each other in exactly the same position as a stranger in possession would to the true owner under the statute? All that the statute declares is, that the possession of a tenant in common shall not be deemed to be the possession of the co-tenants, and under the authority of *Culley v. Doe*

dem. Taylerson, above, and in the judgment of the Court of Common Pleas referred to, the effect of this provision is to bar the co-tenants where one tenant in common has been in possession for the time necessary to work a bar or prevent a recovery.

The difficulty in placing one tenant in common out of possession in respect to another tenant in common in possession, in the same position under the statute as the true owner out of possession is to a stranger in possession, is just this. A tenant in common enters of right—he is not a disseisor, he is not a tenant at will or from year to year, his entry does not give his co-tenants a right of action against him, or a right of entry to exclude him. If his co-tenants should bring an action against him, they would fail unless they proved an actual ouster by him. The leasing of the land in entirety and the perception of the whole rent, is not necessarily an ouster; it is a circumstance to be submitted to a jury, from which an ouster may be inferred.

Lord Kenyon, in *Peaceable v. Read*, 1 East. 575, already referred to, said:

“In *Fairclaim v. Shackleton* there had been a perception of the rent by one tenant in common alone for twenty-six years, but the title of the other being admitted, no ouster was presumed. Without an ouster be found by the jury, the possession of one tenant in common must be taken to be the possession of all. I do admit that, upon the principle of the case of *Lade v. Holford*, 1 Burr. 111, the jury may, from circumstances, presume an ouster, and where the fact is so found the legal consequences would ensue. This decision, being before the statute, does not govern the present case, but, read with the statute, it is so me clear that the effect of the statute is, where the tenant in common has been in possession for the statutable limit, the entry of such tenant shall be assumed to have been an actual ouster of the co-tenants, and therefore their titles would be extinguished.”

Applying this construction of the statute to the facts in the present case, how are the rights of the plaintiff and defendant affected? Sir James Stuart entered in

1843. At that time under sec. 3, ch. 88, Consol. St. U. C., the other tenants in common could not be barred, the land having been in a state of nature, until the lapse of twenty years from the time they had knowledge of its being in the possession of some other person, and this remained the law until the 1st January, 1865, when the 27 & 28 Vict. ch. 27, came into force, which amended the said third section of the Consolidated Statutes by adding the following proviso: "Provided always that no such action shall be brought or entry made after forty years from the time such possession was taken as aforesaid." In the Court of Common Pleas in this case this proviso was held to be retrospective, and so the tenants who had never taken possession were barred, as fifty-three years had elapsed from the first taking possession by the original wrong-doers, Robinson and Landon; and there is no doubt this would be so if no regard is to be paid to what was the position of the parties when that Act came into force. In 1858, Douglas Prentiss, through whom the defendants claim had entered into possession, and he had a right to so enter. His right was the same as that of the other co-tenants. If no one had been in possession at that time, his entry of right gave no one a cause of action. No one was then barred. After his entry, he did not assume to deal with the whole land, but with three undivided fifths, one of which he owned and the others he claimed under a mistake. His entry may at most be said to have been an ouster of Sir Charles James Stuart's grantee, Edwards, by taking the land out of the possession of the tenants Sir James Stuart had put in possession, and the leasing of three-fifths when he only owned one; but giving his entry this effect, Edwards would not be barred, as from that time twenty years had not elapsed when this action was brought, unless Prentiss has the right to tack on to his own possession the previous occupation by Sir James Stuart's tenants, which would carry the possession back to 1853, and bar the plaintiff in respect of the fifth derived through Sir Charles James Stuart, but for the reason already given, that

there was no right of action in Edwards against Prentiss on any reason of his lawful entry, and obtaining the possession from the tenants of Sir James Stuart, was not upon the evidence a dispossession or ouster of Edwards, the then owner of the fifth. .

In *Doe Burnham v. Bower*, 8 U. C. R. 609, where an attempt was made to avoid a conveyance by a reversioner made while a tenant of the owner of the life estate, a tenant by the curtesy, was in possession under 32 H. VIII. ch. 9, Sir John Robinson, C. J., said :

"The reversion could well be conveyed by the heir, notwithstanding he was not at the time in possession ; for he could not be disseised of his reversion by the fact of any person being in possession, either in privity with the tenant by the curtesy or without his privity. He could not have resorted to any remedy for dispossessing Nicholas Bower if his possession had been ever so tortious."

And in *Doe dem Charles v. Cotton*, at p. 315 of the same volume of Queen's Bench Reports, the same learned Judge said :

"A tenant holding over is in no case a disseisor, for the origin of his possession is seen and he is known not to be claiming the fee."

The only importance of this opinion of the Chief Justice in the present case is to shew that the tenants of Sir James Stuart could not be held to be holding adversely to their landlord's heir, and that a person who is in possession in respect of lawful title cannot be deemed to be holding adversely to another having title also, not inconsistent with the title of him in possession, and the effect and nature of such holding under the Statute of Limitations, must be decided upon the express provisions of that statute.

I assume, as was determined in the Common Pleas, that Edwards, the grantee of Sir Charles James Stuart, might have entered in respect of his fifth in 1857, or Sir Charles himself in 1853, and that under the 4th subsection of section 2 of the Act a right of entry accrued to the latter to

bring an action to recover the land, but that that right was interrupted by the entry of Douglas Prentiss, who by force of his own title had a right to hold the possession, and his entry having determined the holding of Sir James Stuart's tenants, was in effect the same as an entry by a landlord upon his tenant at will after the determination of the will by operation of the statute, and allowing the tenant to continue in possession afterwards, which has been held to create a new tenancy at will from such entry. *Turner v. Doe dem. Bennett*, 9 M. & W. 643. And in *Keyse v. Powell*, 2 E. & B. 132, where one of two grantees of the veins of coal under certain closes for ninety-nine years, was in possession of the surface as tenant from year to year, it was held that such possession enured to the benefit of the other grantee, who did not enter till more than twenty years after the grant, and consequently after his right of entry accrued, for which entry he was sued by the owner, a copy-holder in fee. The tenant of the surface occupied from the time of the lease or grant in 1821 till 1831, when he died, and in 1832 his executrix gave up possession of the surface to the then copy-holder in fee. Lord Campbell in giving judgment, page 146, said :

“Braithwaite (the yearly tenant of the surface,) must be considered as continuing in possession, his estate being enlarged by the lease. Being already in possession, there could be no necessity for any entry to put him in possession under the lease; and we have not been told how he could have entered upon himself. When the lease was executed, he was then in a situation to have taken a release in fee of the minerals, or any intermediate interest between the fee simple and a tenancy from year to year. A lease for ninety-nine years, must for this purpose operate in the same manner as a release for that term. Had Braithwaite been the sole lessee of the minerals, the point does not appear to admit of any doubt. Does it make any difference for this purpose that the lease was to him and another? Must not his possession under the lease be construed the possession of himself and his co-lessee? Braithwaite being lawfully in possession under the lease,

his possession enures for the benefit of both ; and the interest passing by the lease cannot be considered a mere *interesse termini*."

In *Myers v. Doyle*, 9 C. P. 376, Draper, C. J., in referring to the above case, said :

"And although the case of *Keyse v. Powell*, shews that the possession of one joint tenant may enure as the possession of both *for their mutual benefit*, that does not affect the position stated by Sir E. Sugden." Which the learned Chief Justice states as follows :

"The statute of 1834, sec. 24, is a copy of the English Real Property Statute, 3 & 4 Wm. IV. ch. 27, sec. 12, which Sir E. Sugden observes, (Real Property Statutes, 66,) sets at rest an important point constantly arising between such owners, (that is coparceners, joint tenants or tenants in common), and it operates by relation back from the first commencement of the separate possession, and although the legal estate is vested in a trustee for several persons as tenants in common ; yet if some have been for twenty years in possession of the whole or received the profits thereof through their agent, and the trustee had taken no step, that would constitute a clear title under the statute to the whole in the persons who have thus enjoyed the property ; and now an entry by one coparcener is not an entry by both, for the statute makes the possession of one coparcener no longer the possession of the other. There is no distinction in this respect between the entry of one coparcener or of one joint tenant or tenant in common."

This language of Lord St. Leonards, is not at variance with the view I have endeavoured to present. The Real Property Act or Statute of Limitations did not change the law relating to the rights of coparceners, joint tenants, or tenants in common, except in the one particular, of declaring the possession of one not to be the possession of the other, and thereby permitting one in possession to extinguish the title of a co-tenant not in possession, without establishing an ouster by proof of actual dispossession or circumstances from which an actual ouster might be inferred. Therefore, as in *Keyse v. Powell*, while the entry of Douglas Prentiss in 1858 did not put the other tenants in common in actual possession, it enured to their benefit by

the removal of those whose possessions might have sooner ripened into a title, and made a new or fresh point of commencement for the statute. A tenant in common is still liable to account to the other tenants in common for their share of the rents and profits, and cannot be successfully sued in ejectment unless the plaintiff is able to prove an actual ouster: See sections 56 and 57 of the Ejectment Act R. S. O. ch. 51. I am of opinion, therefore, the plaintiff is entitled to recover in respect of the one-fifth derived through Lady Stuart, and also in respect of the other three-fifths, for the same reasons.

I think the entry by Douglas Prentiss in 1858, must be the point from which the statute began to run in respect to them, as well as to the other fifth; but I have considerable doubt as to whether they may not be in the more unfavourable position of having the possession of Sir James Stuart from 1843 counted against them, in which case they would be barred—for more than twenty years elapsed between that time and the commencement of the suit, and the suit was not commenced till more than forty years after the original entry by the squatters, Robinson and Landon. But in my view of the effect of the statute, every entry by a fresh tenant in common makes a new point of commencement for the running of the statute against another tenant in common, unless a tenant has been in possession for the full period of twenty years, or a tenant while in possession transfers his estate to another who enters, in which case the two possessions would form part of the time constituting the bar, and one could be tacked or added on to the other, which is not the case here.

The amendment made in the law in respect to lands granted and taken possession of by some person other than the owner while in a state of nature, by the 27 & 28 Vict. ch. 27, must be considered in reference to the condition of the land and position of the owners at the time the Amending Act came into force, that is to say, the 1st of January, 1865. At that time two persons claiming under grantees of the Crown had entered into possession, and one was then by

is tenants in the actual occupation of the land, which was condition that does not appear to be within the third section. On the day preceding that date the other tenants in common, assuming them to have had no knowledge of the land being in possession of any one, had by law a right to make an entry or bring an action at any time within twenty years after acquiring such knowledge.

The amendment, if it can apply to this case, not only took away that right but would also deprive them of all right, as at least forty-one years had elapsed after the entry of Robinson and Landon in 1823, before the action was brought.

In the view that I take, it cannot have this effect. The entry by Sir James Stuart did away completely with the effect of the original entry by these trespassers, and left the parties to their right as it would have been if section three had not been enacted; that is to say, to bring an action within twenty years after their right of entry accrued—which, if I am right in the construction I have placed upon the statute, was when Douglas Prentiss entered. What I mean is, that is the time from which the statute would commence to run. In the sense of removing any one from the possession, the right did not then exist, and Douglas Prentiss was in of right and not removable. Perhaps the intention of the Legislature was to deprive the owner of land absolutely of all right after the lapse of forty years, without an actual occupation by him; but it was not said so—neither of the clauses relating to the forty years' limit goes that far. Section three extends the time for bringing the action to forty years, though there might have been an actual adverse occupation for the whole time; and section 45 has the same effect where the person is entitled to recover, but is under certain technical disabilities. In both cases a right to enter or bring an action to recover existed during the whole period. The meaning of "recover" is thus stated by Rolfe, B., in *Grant v. Ellis*, M. & W. 122:

"So far as relates to land, the word recover in the passage, (sec. 2, 3 & 4 Wm. IV. ch. 27) clearly means the same thing as obtain *possession or seisin of*. The clause assumes one party to be in wrongful seisin or possession of land to which another has the right, and then limits the time within which the right must be asserted.'

In the case of *Peaceable v. Read*, already referred to, Lord Kenyon says :

"In *Taylor doe dem. Atkins v. Horde*, Lord Mansfield said, 'that in order to advance justice, he would enable the real owner in such a case to consider himself kept out by wrong or not at his election.' So a tenant in common may rely on the possession of his co-tenant as his own, unless there be an actual ouster in fact or the jury find it from circumstances."

In the same case LeBlanc, J., said, at p. 578 :

"The case is no more than this, that one tenant in common, without ousting his companion, or setting up any adverse claim, levies a fine of the whole in 1796, and afterwards receives all the rents. *Prima facie* the receipt of rent by one tenant in common shall be taken to be for all, and according to the right, and it rests upon him to shew that it was received for himself only. Of this there is no evidence. The levying a fine of the whole by one has been settled to be in itself no ouster of the other, and nothing appears to shew that at the time it was levied Pearsall claimed adversely to the lessor. Therefore there was no evidence to leave to the jury from whence to presume an actual ouster at the time of the fine levied."

This language applied to the entry by Sir James Stuart would shew before the present Statute of Limitations that it must be considered of right and not of wrong, and therefore did not work as against the other tenants in common an extinguishment of title and bar of action, his possession not having been continued for twenty years. So also when Prentiss entered, treating his entry of right or of wrong, defendant claiming under him had not acquired a statutory title, as the full twenty years had not elapsed after such entry before action.

I am of opinion, therefore, that the judgment of the

Court of Common Pleas ought to be reversed, and the rule *nisi* of that Court to enter a verdict for the plaintiff for four undivided fifths should be made absolute, on the ground that the plaintiff's right as a tenant in common has not been barred. But I think, if the plaintiff is not in any different position from one who is not tenant in common claiming against a stranger, or a tenant in common claiming against one who is not a tenant in common, the judgment is right, and the plaintiff is not entitled to recover any part of the land, the actual occupation of part of the lot being, in my opinion, a possession of the whole, unless the occupant by some act of his own shews his intention to restrict his possession to part only, and clearing and cultivating a part merely is not evidence of itself of such restriction. To hold that a trespasser or squatter entering upon a lot of land is to be limited in his right to resist the title of the true owner merely to the part of the land that he has in his actual visible occupation, by enclosure or otherwise, is to restrict the expressed intent and operation of the statute.

The Act does not say that the occupant of a piece of land forming part of a larger lot shall after twenty years' possession acquire a title to such piece, but that "no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims, and at the determination of such period the right and title of such person to the land or rent for the recovery whereof such entry, distress, action, or suit, respectively, might have been made or brought within such period shall be extinguished."

It is hardly possible to conceive that the Legislature intended to extinguish the owner's title to a few acres of irregular form, perhaps in the centre of a lot, that were cleared twenty years, and to keep it intact and unimpaired to fifty acres cleared by the same person nineteen years before action brought; and when, as under section three,

there is a definition of what constitutes actual possession by the owner, making residence by him with or without cultivation of the land, and cultivation of a portion without residence, an actual possession, it is difficult to suppose that the Legislature intended a different kind of possession on the part of the occupant to constitute possession of the lot or part of lot covered by the title of the owner, from that of the owner himself. Section 3 is as follows :

"In case of lands granted by the Crown of which the grantee * * has not taken actual possession by residing upon or cultivating some portion thereof, and in case some other person * * has been in possession of such land, such possession having been taken while the land was in a state of nature, then unless it can be shewn that such grantee * * while entitled to the lands had knowledge of the same being in the actual possession of such other person, the lapse of twenty years shall not bar the right of such grantee * * to bring an action for the recovery of such land, but the right to bring such action shall be deemed to have accrued from the time that such knowledge was obtained ; provided always, that no such action shall be brought or entry made after forty years from the time such possession was taken as aforesaid."

I presume that if it were shewn that the true owner entered and put up a shanty in which he resided for three months, or any period, and without having cut a stick of timber or cultivated a foot of ground left, he would be bound to bring an action in twenty years against any one who entered and resided in the shanty he put up. Then would the action be confined to the shanty merely, or to what the owner was in actual possession of, by residing in the shanty ; and if clearing and cultivation, are essential to possession, how could possession be taken while the land was in a state of nature ? and what meaning can be given to the above proviso, that no such action shall be brought after forty years from the time possession was taken as aforesaid ; that is, possession taken while the land was in a state of nature.

In contemplation of law, every man's land is enclosed and set apart from his neighbour ; and that either by a

visible and material fence, as one field is divided from another, by a hedge or by an ideal invisible boundary, existing only in contemplation of law, as when one man's land adjoins to another in the same field; and when one enters upon another's land, he is charged with trespassing upon the lot or land, by the designation by which the land is known. The decisions in the Courts in this country would seem to have followed one upon the other without independent consideration of the question by each Court; but that there should have been a decision at all by any of the Courts contra to the view I have taken, causes me to feel that my own judgment, by which I must in this case be governed, may be erroneous. I would much rather follow than dissent from these decisions, and regret that I am not able to take the view of the effect of the statute they have assigned to it.

The case referred to in the argument, of *McConaghy v. Denmark*, 4 S. C. R. 609, wherein Mr. Justice Gwynne, at page 633, has collected the cases decided in the Courts of Ontario, does not determine the question presented in the present case, though that learned Judge approves of the view, that there must be an actual visible occupation to bar the true owner; a position I do not dispute, but such may be of an acre or less cultivated or by residence without cultivation on a portion of the whole.

Appeal allowed.

MEMORANDUM.

By an order of the Supreme Court of Judicature of Ontario, passed on Saturday, the 2nd, day of September, 1882, it was directed—

“That the appeals from the County Courts now standing for hearing be heard by any three Judges of the Supreme Court of Judicature of Ontario, instead of the same being heard by the Court of Appeal.

“That the Judges of the said Supreme Court to hear such appeals be from time to time selected by the Chief Justice of Ontario, the Chief Justices of the Queen's Bench and Common Pleas Divisions, and the Chancellor, or any two of them.”

And on Monday, the 4th day of September, 1882, the Chief Justice of Ontario and the Chief Justice of the Common Pleas Division, under the foregoing Rule, did

“Nominate and select the Chief Justice and Justices of the Common Pleas Division to hear the appeals from the County Courts, and from the Judges of the said County Courts now standing for hearing in the Court of Appeal.”

MUTTON V. DEY.

Contract—Time.

the plaintiffs and defendant entered into an agreement in the following terms: "I, the undersigned, agree to deliver S. S. Mutton & Co., 40 M. ft. blk. ash., with mill-culls out, f. o. b. vessel on Cornwall canal, at \$10 per M. ft. Also 10 M. ft. soft elm at \$10 per M. ft. f. o. b. vessel on Cornwall canal, to be delivered in the month of June, 1881, the lumber now on stick and part seasoned," and the plaintiffs signed a corresponding memorandum, agreeing to accept such lumber at the time specified.

Held, that the words "with mill culls out," applied to the ash only, not to the elm.

Held, also, that the plaintiff, not having had a vessel ready to receive the lumber in June, could not recover.

Per OSLER, J. Time was of the essence of the contract, and the defendant was not bound to deliver the lumber in September.

THIS was an appeal by the plaintiff from the County Court of York.

The action, which was commenced by writ dated 28th December, 1881, was by Samuel Sibley Mutton against Thomas Dey, and the statement of claim was filed 10th January, 1882, setting forth that the plaintiff was manufacturer of and dealer in lumber, lathes, and shingles, carrying on business in the city of Toronto, in the county of York, the defendant being a lumber dealer, carrying on business at the village of Moose Creek, in the county of Stormont, and alleged that on the 11th day of April, 1881, it was agreed by and between the plaintiff, trading under the firm name of S. S. Mutton & Co., and the defendant, that the plaintiff should buy from the defendant, and the defendant should sell and deliver to the plaintiff, in the month of June following, free on board vessel on the Cornwall canal, forty thousand feet of black ash lumber, with mill culls out, at the price of ten dollars per thousand feet, said price to be paid by the plaintiff to the defendant; and that, though prior to this action all conditions were performed, and all things happened, and all times elapsed to entitle the plaintiff to the delivery of said lumber, yet the defendant had not delivered the same, or any part thereof, but wrongfully refused to deliver the

same, whereby the plaintiff had lost the profit he would have made by the delivery of the same, and had been put to costs and charges in going to Cornwall to receive the delivery of said lumber, and otherwise suffered great damage.

By way of defence the defendant alleged that he carried out and fulfilled his part of the agreement referred to in the plaintiff's statement of claim, by placing on the bank of the Cornwall canal the said forty thousand feet of black ash lumber and ten thousand feet of soft elm lumber for delivery to the plaintiff by placing the same free on board a vessel—to be furnished by the plaintiff—on the Cornwall canal, under the terms of the said agreement, and the plaintiff refused and neglected to furnish the said vessel, and refused and neglected to measure the said lumber, and to take delivery of the same under the terms of the said agreement; and that he was, previous to the close of navigation for the season of 1881, at all times ready and willing to perform the said agreement, according to the terms thereof, but the plaintiff neglected and refused to perform his part of the said agreement.

The case came on for trial before his Honor Judge Mackenzie, when a verdict was rendered for the plaintiff for \$130, leave being reserved to move to enter a nonsuit or verdict for the defendant, which was moved for accordingly, and an order granted to enter a nonsuit.

The appeal came on for argument on the 12th September, 1882.

Rose, Q.C., for the appellant. The contract here was for delivery of lumber, mill-culls out, *i. e.*, subject to inspection; and the evidence shews that the lumber delivered on the banks of the canal included mill-culls; and upon the agent of the plaintiff attempting to cull it, the defendant refused to deliver. Upon the argument of the order *nisi*, the learned Judge thought the plaintiff could not recover because he had failed to prove readiness to accept in the month named, *i. e.* June, holding that the naming of a day

or performance made time of the essence of the contract, and so made the order to enter a nonsuit. The contest at the trial was chiefly if not entirely as to the terms of the contract, and as to whether the plaintiff was entitled to have the mill-culls rejected. The terms of the writing, however, are clear, and admit of no doubt as to the plaintiff's right to inspect and have mill-culls thrown out. The defendant never supposed he had a right to decline to carry out the contract, because the plaintiff did not appear in the month of June, and in his defence sets up that he was ready to perform during the whole of the season of navigation. The appellant further submitted that either party might waive the right to insist on performance on the day named without having such waiver in writing; and that in this there was no new contract or variance of contract requiring written evidence; and that the law, as stated in *Ballantyne v. Watson*, 30 C. P. 529, supported the appellant's contention.

Jos. E. McDougall, for the respondent.

The judgment of the Court was delivered on September 6, 1882, by

GALT, J.—This was an action brought to recover damages for the non-delivery of a quantity of ash lumber, and also of elm, under the terms of the following agreement dated 14th April, 1881: "I the undersigned agree to deliver to S. Mutton, & Co., 40 M. feet blk. ash *with mill culls out*, f. o. b., vessel on Cornwall canal, at \$10 per M. feet, also 10 M. feet soft elm at \$10 per M. feet f. o. b. vessel on Cornwall canal, to be delivered in the month of June, 1881, the lumber now on stick and part seasoned."

The defendant pursuant to the terms of the above agreement drew the lumber (a distance of seven miles) to the Cornwall canal in time to perform his part of the agreement. The plaintiff by his agent had executed a counterpart thereof—but did not send a vessel in June to receive it. In the month of September they sent an agent, Smith, to get this lumber among other bought by them, and a

the time. It was however argued by Mr. Rose that time was not of the essence of the contract, and therefore the plaintiffs could insist on a fulfilment by the defendant at any time. I fail to see the force of this argument. This was an agreement for the sale of goods to be completed in the month of June, and it would be contrary to what must have been the intent of the parties to hold that at the option of the plaintiffs the defendant was bound to remain out of receipt of the purchase money, and at the same time to incur the responsibility of a loss by fire or other casualty to articles which by their very nature are subject to damage from a great variety of causes.

But apart from this, we are of opinion, for the reasons above given, that the plaintiffs are not entitled to recover.

OSLER, J. [In concurring in the views expressed by GALT, J.] Time, by the very terms of the memorandum itself, is of the essence of the contract and the defendant was not bound to deliver the lumber in September.

Appeal dismissed, with costs.

Appeal dismissed.

JAMES V. BALFOUR.

Statute of frauds--Promise to pay debt of another.

collateral verbal promise to pay the debt of another, who still remains liable, although founded on a good consideration, is not binding. Therefore where defendant had bought the stock of one A., who was indebted to the plaintiff for wages, and in order to induce the plaintiff to continue with the defendant, the defendant promised to see that he was paid, and the plaintiff did accordingly work for the defendant. *Id.*, reversing the judgment of the County Court, that the Statute of Frauds was a bar to the action.

Appeal from the County Court of the county of Welland. The action was by John James against Robert Balfour; and the statement of claim therein set forth (1) that on the 1st October, 1880, the plaintiff began to work for one W.

Allen, at \$13 per week; (2) that on the 1st January, 1881, the wages were increased to \$15 per week; (3) that on the 8th May, 1882, under execution against Allen, the sheriff sold the stock-in-trade of said Allen to defendant, who assumed and carried on the business, and still had charge of the same; (4) that the defendant on said 9th May, in consideration that plaintiff would go on and work for him, agreed to pay plaintiff the wages then due, and also wages while he continued work at the rate last aforesaid; and the plaintiff thereupon and on the strength of such promise went on to work, and continued thereat until the month of September last past; and (5) that \$131.75 was due to the plaintiff from defendant for work done as aforesaid after making all deductions for moneys and goods received, for which an account has been rendered to defendant.

By the statement of defence the defendant denied making the agreement set out in the fourth paragraph; admitted agreeing to pay the plaintiff wages from the date of purchase of Allen's stock; alleged payment of such wages; denied the allegations in fifth paragraph, and admitted allegations in the third paragraph.

By an amended statement of defence, the defendant set up the Statute of Frauds as an answer to the claim under paragraph four in the statement of claim.

The action came on to be tried before the Judge of the County Court, without a jury.

The evidence taken at the trial shewed that defendant had become the purchaser at sheriff's sale of a tailoring business of one Allen, who was indebted to the plaintiff in the sum of about \$154, which amount the defendant had promised to pay to the plaintiff before he would go on with the work in the establishment for the defendant.

The defendant subsequently refused to pay the plaintiff, and thereupon this action was brought. After hearing the evidence, the learned Judge gave judgment for the plaintiff.

The defendant appealed, and the appeal came on for argument on the 12th of September, 1882.

Rose, Q.C., for the appellant.

Osler, Q.C., for the respondent.

McDonell v. Cook, 1 U. C. R. 542; *McDonald v. Glass*, 8 U. C. R. 245; *Tumblay v. Meyers*, 16 U. C. R. 143; *Rounds v. May*, 35 U. C. R. 367; *Birkmyr v. Darnell*, 1 Sm. L. C. 326, 8th ed., were referred to.

September 16, 1882. WILSON, C. J.—The question is, whether a collateral verbal promise to pay the debt of another, who still remains liable, although founded on a good consideration, is binding upon the promisor?

The leading case of *Birkmyr v. Darnell*, in Smith's L. C. vol. 1, p. 326 (8th ed.), and the authorities there commented on, shew the engagement of the promisor must be in writing, although the promisee may have given forbearance to his debtor or some other consideration for the making of the promise, so long as the original debtor remains liable.

The rule is, that in such a case the new promise, being only collateral, must be in writing. *Rounds v. May*, 35 U. C. R. 367, is a decision following these cases.

The plaintiff therefore cannot recover, because the promise of this defendant was merely collateral to the primary

bility of W. G. Allen to the plaintiff, and it was not in writing.

The appeal must be allowed, with costs.

OSLER, J.—This question is too firmly settled to be now debated.

The test is stated in 1 *Wms. Saund.* ed. of 1871, 233; *Orth v. Stanton*.

The question whether a particular case comes within the statute of Frauds depends "not on the consideration for a promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise."

The case before us cannot possibly be distinguished from *Armstrong v. Treakey*, 37 U. C. R. 360-367, where one Armstrong, had contracted to build houses for defendant, and the plaintiff had agreed with Armstrong to do the brickwork, but having doubts about the latter's ability to go on, hesitated to go on. Thereupon the defendant told him that he would pay him if he would go on with the work. Armstrong still remained liable. It was held that the promise was within the statute, and not being in writing, the plaintiff could not recover. *Lee v. Mitchell*, 23 U. C. R. 314, and *Merner v. Klein*, 17 C. P. 287 are to the same effect.

In *Lakeman v. Mountstephen*, L. R. 7 H. L. 24, there was no third party liable at the time the bargain relied on was made. It was only known that a third party might become liable. It was held that a direct and original promise might be inferred from the words used, on the faith of which the plaintiff gave credit to the defendant solely, though the words naturally imported a collateral undertaking only.

The appeal must therefore be allowed, with costs.

GALT, J., concurred.

Appeal allowed.

ELLIS V. THE MIDLAND RAILWAY COMPANY.

Contract—Excuse for non-performance—Corporate seal—Costs.

Where the plaintiff was engaged by the defendants for "the season," i. e., from early in May till some time in November, as master to manage the steamer *Idyl-Wyld*, for \$1,000. and he continued so employed until September, when the steamer was burnt :

Held, that the plaintiff was not entitled to more than a proportionate share of the salary agreed upon, for the contract was subject to the continued existence of the vessel, and performance was excused by its destruction without the default of the defendant.

Semble, that such a contract made verbally with the president of the defendant company might be binding ; and that a nonsuit for want of the corporate seal was properly set aside.

When the appeal was allowed on a ground raised for the first time on the argument no costs were given.

THIS was an appeal from the County Court of York, setting aside the nonsuit entered at the trial, and directing a new trial before a jury.

The action was commenced 10th November, 1879. The declaration contained :

1st Count.—Common count for work done and materials provided.

2nd Count.—For wages payable by defendants to plaintiff for his work and services as their hired servant.

The defendants pleaded, 1st, Never indebted ; (2) Payment before action ; (3) Payment since action.

The action was tried before his honour Judge Mackenzie, without a jury, at the sittings of the County Court, held at Toronto on the 23rd day of February, 1882, when the plaintiff was examined on his own behalf, and proved that he was employed by the Midland Railway Company, and saw the president of the company, Mr. Hugel—nobody else—with regard to his employment, and made the bargain with him early in March, 1877 ; saw him in Toronto several times ; and that the agreement was verbal.

"He wanted me to go and fit a steamboat out, and fit her for the season ; the steamboat he was about buying at that time was in Detroit. She was lying in Windsor, but the owners were in Detroit. Her name was then *Idyl-Wyld*. I changed her name under instructions to the *Midland*. She was owned by Mr. Leavitt, of Detroit. I don't know

whether there had been any money paid upon her or not. I was to sail from Waubashene to the Sault. I did not sail her. She was turned where she lay at Windsor. Hugel wanted me to go up to look after this vessel at Windsor. I was to be paid \$1,000 for the season. That was the only bargain. I have had experience in this kind of work. I commenced to fit the vessel out. By the season of navigation I understood from the time we fit the vessel out till we lay her up in the fall. Up there the season of navigation generally commences early in May, and extends right along till the end of November. I expected I was going to be there in that season from May until November. I went up in March. I was to perform the master's duties. I was going to fit out the vessel at Windsor, then take her round to Waubashene when I got instructions from Mr. Hugel to do so. * * I took about two months in fitting her out. That is the duty of a master. I did my duty. I incurred large liabilities. I did not pay people from whom I got stock. I presume the Midland Railway did."

The vessel, it appeared, was destroyed some time in August.

Adolphe Hugel, former president of the defendant company was also examined, and proved the hiring substantially as stated by the plaintiff in his evidence.

At the conclusion of the plaintiff's case the learned judge directed a nonsuit, reserving leave to the plaintiff to move to set it aside.

On the 3rd of April, 1882, the plaintiff moved for and obtained a rule *nisi* to set aside the nonsuit, which, on the 10th of the same month, was made absolute, costs to abide the event. His Honour, in granting the rule absolute, reserving—

"This case was tried before me at the last sittings for the trial non-jury cases in February last, when I ordered a nonsuit to be entered, principally on the ground that the defendants are a corporation, and that the contract in question should have been under seal. Mr. Holman, the learned counsel for the defendants, cited *Austin v. Guardians of the Poor*, 12 Q. B. 361; *Mayor of Ludlow v. Charlton*, 6 M. & W. 816, and other cases. Mr. Huson Murray, for the plaintiff, cited *Pim v. Municipal Council of Ontario*, 9 C. P. 302; *Thornton v. Sandwich*, 25 U. C. R. 591; *Perry v. Corporation of Ottawa*, 23 U. C. R. 391; *Conant v. The City of Montreal*, 17 Gr. 574. The general rule of law is that *prima facie* and for general purposes a corporation can only contract under seal, for the proper legal mode of authenticating the act of a corporation is by means of its seal; on this rule certain exceptions have been engrafted. Does the present case come within any of the exceptions? The cases cited on behalf of the de-

defendants are principally municipal or quasi-municipal corporations. The present corporation is a commercial one. In looking at what is decided in the cases cited by Mr. Murray, and what is stated by such able judges as the late Chief Justice Draper, and the present Chief Justice of Ontario (Spragge), and Chief Justice Hagarty, I think the nonsuit must be set aside, costs to abide the event to the successful party. I will direct also that the case be put on the jury list, so as to take their opinion on the questions of fact, such as, adoption, repudiation, assent."

From this decision the defendants appealed on the following, amongst other, grounds :

1. That the alleged contract was a verbal one between Mr. Hugel, then president of the company, and the respondent, and is not binding on the appellants.

2. That it does not appear that the directors of the company authorized the purchase of the vessel or the hiring of the respondent, and such hiring was beyond the powers of the president, and the appellants are therefore not liable.

3. That the appellants had, at the time of the making of the alleged contract, no authority or power to purchase or run vessels, and that the assumed purchase was *ultra vires*, and the alleged hiring of the respondent as captain of the vessel beyond their authority or power.

4. That the appellants derived no benefit or advantage from the alleged hiring of and work done by the respondent.

5. That it appears from the evidence that the respondent was, before action, fully paid for all services performed by him for the appellants.

6. That this action was settled between the respondent's solicitor and the appellants by the payment by the appellants of a compromise in full of said claim and such settlement is binding on the respondent.

Lush, Q. C., for the appellants.

Huson Murray, for respondent.

In addition to the grounds of appeal above set forth, counsel for the appellants objected that the steamer, the subject of the hiring, having been destroyed by fire, the contract was at an end. In addition to the cases cited in

the Court below, *Sutton v. Spectacle Makers' Co.*, 10 L. T. J. S. 411; *Diggle v. London & Blackwall Railway Co.*, 5 Ex. 442; *Crampton v. Varna Railway Co.*, L. R. 7 Ch. 562; *Governor & Company of Copper Miners v. Fox*, 16 Q. B. 29; *Appleby v. Myers*, L. R. 2 C. P. 651; *Taylor v. Caldwell*, 3 B. & S. 826; *Chamberlain v. Trenouth*, 23 C. P. 497; *Anglo-Egyptian Navigation Co. v. Rennie*, L. R. 10 C. P. 71, were referred to.

September 16, 1882. The judgment of the Court was delivered by

OSLER, J.—We see no ground for disturbing the judgment of the learned Judge of the County Court setting aside the nonsuit, and granting a new trial, on any ground taken before him, or in the printed reasons of appeal. We cannot say that the contract on which the plaintiff relies is not one which may be perfectly valid although not under the corporate seal of the defendants; and had that been the only question before us, we should have said that the learned Judge had properly set aside the nonsuit in order that further inquiry might be made on the points indicated in his judgment.

An objection was, however, taken for the first time by Mr. Lash on the argument which is clearly open on the pleadings and evidence, and goes to the root of the plaintiff's case.

The action is on the common counts for work and services; but the plaintiff's evidence shews that his real claim is for damages for breach of a special contract. The agreement, as the plaintiff states it, was, that he should be employed as master of the steamboat *Idyl-Wyld*, for the season of 1877, and should be paid one thousand dollars for the season. This was in March. The season commences early in May, and ends in November. The plaintiff remained in the defendants' employment until the month of August, when the vessel was burnt.

It is now contended that the destruction of the vessel

has put an end to the contract, and to any right of the plaintiff to recover further remuneration. He has already been paid a sum of \$832, or thereabout, which would more than cover the proportionate part due, if it was due, for the period of his actual employment, but this the defendants do not seek to recover.

We understand Mr. Murray to admit that he cannot hope to maintain his action in respect of a demand of any other nature, and the particulars of claim in the action indicate that this is the only claim the plaintiff relies on. There is, therefore, no reason for sending the case down again if on this state of facts it appears that he cannot recover.

We think the authorities shew that on such a contract as the one in question the continued existence of the vessel is in the contemplation of the parties, and the contract is subject to an implied condition that they shall be excused in case before breach performance becomes impossible from the perishing of the thing without the default of the contractor. The plaintiff's services were to be rendered as the master of this particular vessel, not generally as master of any vessel in the employ of the defendants, and the case is, in our opinion, clearly within the principle acted on in *Taylor v. Caldwell*, 3 B. & S. 826, and that class of cases. There A. agreed with B. to give him the use of a Music Hall on certain specified days for the purpose of holding concerts, with no express stipulation for the event of the destruction of the building by fire. A fire occurred by which the hall was destroyed before any breach of the contract, and it was held that both parties were excused from its performance. Blackburn, J., in delivering the judgment of the Court, after commenting on the authorities, says, at p. 839: "The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied, that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance."

Here, for the reason already given, the parties must have

contemplated the continued existence of the vessel, to sail and manage which the plaintiff was employed, and we think its destruction put an end to their contract.

I have referred to several of the cases bearing on the point in the recent case of *Boswell v. Sutherland*, 32 C. P. 131. See also *Anglo-Egyptian Co. v. Rennie*, L. R. 10 P. 271.

We think the appeal must be allowed, but as the point on which we allow it was raised for the first time on the argument, we do so without costs.

Appeal allowed.

BENNETT V. THE GRAND TRUNK RAILWAY COMPANY.

Collision at crossing—Contributory negligence.

The servant of the plaintiff was in charge of an omnibus running to and from the station of the defendants' railway, and on the evening in question was attending at Georgetown station, at about ten feet from the track, but was unable to see along the railway in either direction by reason of houses intervening. By leaving the omnibus, however, and going to the track he could have seen an approaching train; but omitting to take this precaution, although aware that a freight train was then on the track near the crossing, he started off to cross it, and did not hear or see anything of the approaching train until within about four feet of him, when he was unable to avoid it, and the bus and harness were considerably damaged. It was not shewn that the driver of the train had given any warning of its approach by sounding the whistle or bell on its nearing the part of the track where it crossed the road to the station. At the trial the plaintiff was nonsuited on the ground of the contributory negligence of the plaintiff's servant.

Held, on appeal, reversing the judgment of the County Court, that the question of contributory negligence had been improperly withdrawn from the jury, and that a new trial must be had in order to submit that question to them.

Appeal from the County Court of Halton, discharging an order *nisi* for a new trial.

The action was one for running down the plaintiff's horses and carriage, by collision, at a highway crossing, with defendant's train.

The defendants pleaded "not guilty," as in the said declaration alleged, by Consol. Stat. C. ch. 66, sec. 83, public Act.

The cause came on to be tried before his Honor Judge Miller, with a jury, when a verdict was rendered for the plaintiff, and \$110 damages. The defendants moved for and obtained an order granting a new trial, costs to abide the event.

The case was again tried before the same Judge at the December Sittings, 1881, at Milton, with a jury, and a nonsuit was entered on the ground of contributory negligence on the part of the plaintiff's servant. Leave was reserved to move for a new trial, his Honour remarking that he was not clear but that the proximate cause of the damage complained of was the defendants' neglect.

The plaintiff thereupon obtained a rule *nisi* to set aside

such nonsuit, which, after hearing counsel, his Honour discharged, on the grounds that the negligence of the plaintiff's servant was the proximate cause of the accident, and that there was no evidence to go to the jury.

From this judgment the plaintiff appealed to this Court, on the following grounds :

1. That the nonsuit entered was against law and evidence. (2) That there was evidence of negligence on the part of the defendants to go to the jury : *Jones v. Grand Trunk R. W. Co.*, 45 U. C. R. 193 ; *Williams v. Great Western R. W. Co.*, L. R. 9 Ex. 157 ; *Gee v. Metropolitan R. W. Co.*, L. R. 8 Q. B. 161-175 ; *Clayards v. Dethick*, 12 Q. B. 439 ; *Marriot v. Stanley*, 1 M. & G. 568 ; *Shields v. Grand Trunk R. W. Co.*, 7 C. P. 111 ; *Tuff v. Warman*, 1 C. B. N. S. 573 ; *Tyson v. Grand Trunk R. W. Co.*, 20 C. R. 256 ; *Vars v. Grand Trunk R. W. Co.*, 23 C. P. 143 ; *Maries v. Mann*, 10 M. & W. 546 ; *Anderson v. Northern R. W. Co.*, 25 C. P. 301 ; *Ryder v. Wombwell*, L. R. 4 Ex. 12 ; *Bilbee v. London and Brighton R. W. Co.*, 18 C. B. N. S. 34 ; *Dublin, &c., R. W. Co. v. Slattery*, L. R. 3 App. Cas. 555 ; *Weller v. London and Brighton R. W. Co.*, L. R. 9 C. P. 126 ; R. S. O. ch. 165, sec. 3, sub-sec. 6, secs. 92 and 93 ; Consol. Stat. C. ch. 66, sec. 6, sub-sec. 12, secs. 104, 144, and 145. (3) That there was no contributory negligence on the part of the plaintiff, or at least not such contributory negligence as should warrant the action being withdrawn from the jury, and entitle the defendants to a nonsuit, or prevent the plaintiff recovering damages. (4) That the proximate cause of the damage complained of was the negligence of the defendants : *Flower v. Adam*, 2 Taunt. 4 ; *Williams v. Holland*, 10 Bing. 112 ; *Vennal v. Turner*, 1 C. & M. 21. (5) That the question of negligence and contributory negligence is a question for the jury : *Salton v. County York*, 6 A. R. 181 ; *Haldan v. Great Western R. W. Co.*, 30 C. P. 89 ; *Metropolitan R. W. Co., v. Jackson*, L. R. 3 App. Cas. 193 ; *Bridges v. The North London R. W. Co.*, L. R. 7 H. L. 213 ; *Jewell v. Parr*, 13 C. B. 9.

The appeal came on for argument on the 6th September, 1882.

Bigelow and Schoff, for the appellant.

Bethune, Q.C., and *Woods*, for the respondents.

The facts are sufficiently stated in the judgment.

September 16, 1882 WILSON, C. J.—The evidence in this case is of the most meagre description.

The plaintiff claims damages from the defendants for the breakage of his omnibus, &c., by their train.

The bus was at the Georgetown station, and while standing there the driver could not see along the railway track on either side of the narrow road he was upon by reason of buildings being in the line of sight. At that spot he was nine five-twelfths feet from the track. He knew the freight train was upon the track at some little distance from the crossing. He did not, before mounting his bus, go that short distance to see if it would be safe to cross the track, but he drove off at once on a trot, looking straight before him. When he got to the track the train was within four feet of him, it was too late to pull up in time, and damage was done to the conveyance and harness. If the driver of the train did not give warning of its approach either by sounding the whistle or ringing the bell as it approached the point where the track crossed the road to the station, as I think he should have done as a matter of precaution, the jury might have been asked to say whether it was a proper precaution to be taken on the occasion, and if it were, and was omitted, to say further whether that omission was a careless and negligent omission.

As there was a nonsuit, we must assume the driver of the engine should have given such warning, and did not, and so for the purposes of the case as it now stands, we must assume the defendants were in default in that respect.

The question to be considered is one of contributory

negligence. Was there evidence of it, and if there was, was it evidence of that nature which the Judge could properly determine himself and withdraw from the jury, or should it have been submitted to the jury?

The question has been largely discussed in the *Dublin, Wicklow, and Wexford R. W. Co. v. Slattery*, 3 App. Cas. 55.

There is no use in commenting upon that case as decided by the majority of the Lords who took part in the decision, however much we may be dissatisfied with it. We must accept it as it is. And according to it, the case should have been left by the learned Judge to the jury. I feel that the decision referred to has curtailed the powers and discretion of Courts and Judges, which had not, that I am aware of, ever been abused, and enlarged the functions of the jury, which may in cases of this kind be very dangerously used against such companies.

OSLER, J.—This case raises again the oft-mooted question as to the duty of the Judge in disposing of the question of contributory negligence on the trial of a cause with a jury, where there is evidence of negligence on the part of the defendants.

That there was such evidence in this case, consisting of the omission to observe reasonable and proper precautions against the occurrence of an accident at the place in question, which could not properly have been withdrawn from the jury, is not disputed.

The learned Judge has, however, nonsuited the plaintiff, because in his opinion the proximate cause of the accident was the plaintiff's own negligence, not that of the defendants. This, I think, with deference, it appears from the evidence he ought not to have done. The evidence of the plaintiff's contributory negligence, although extremely strong, is not of so conclusive a character as to warrant a Judge in holding that it was, to use the language of Lord Cairns in *Dublin, Wicklow, &c., R. W. Co. v. Slattery*, 3 App. Cas. at 1166, the mere folly and recklessness of the plaintiff,

and not the negligence of the company, which caused the accident; or that the carelessness in not whistling could not be connected with the accident to the man who rushed with his eyes open on his own destruction. The case I have referred to, which is now the leading case on this subject, but which does not, so far as appears from the appeal books, seem to have been called to the attention of the learned Judge, contains in the judgments of the majority of the Court so full an exposition of the duty of a Judge under the circumstances I have mentioned, that I may be excused for making some extracts therefrom, which seem to indicate the proper rule. At page 1189, Lord Selborne, says:

"With respect to the issue of contributory negligence, it was contended that the Judge ought to have held that the plaintiff had failed to make a case proper to go to a jury, on the ground that there was proof of contributory negligence sufficient to neutralize the effect of the evidence given of negligence by the company. But I do not understand how, under such circumstances, the question of contributory negligence could cease to be one of fact for the jury. If, indeed, there had been no evidence at all given, except what necessarily went to shew that the negligence of the deceased himself was the cause of his death, a Judge might have been quite right in saying that there was no evidence in support of the plaintiff's case to go to a jury. Such a case would have existed here if it had been admitted that all proper warning was given by whistling, or otherwise of the approach of the express train, and that the deceased, neglecting that warning, nevertheless persisted in crossing the line. But, as the present case actually stands, and upon the supposition (which has been affirmed by the verdict,) that there was no whistling, the question of contributory negligence appears to me to have been one particularly fit to be submitted to a jury."

Lord O'Hagan, page 1184, says:

"The circumstances establishing such negligence [*i.e.* contributory negligence of the plaintiff,] and the inferences to be drawn from them, were equally and exclusively for the consideration of the jury. It was for the jury to find the facts and to draw the inferences of fact, and the Judge

would, in my mind, have transcended his jurisdiction in finding the former or making the latter." And again at 1185:

"Assuming the evidence of the defendants to have been as convincing as it has been held to be by some of my noble and learned friends, I am not the less of opinion that it was rightly submitted to the jury. I cannot understand how the mere strength of proof, where there is an issue of fact to be decided, can transfer the right of decision to the Judge. I do not acknowledge the force of the reasoning which would convert an issue in fact into an issue in law, merely because there seems to be a complete preponderance of evidence upon the one side, or because there is no evidence on the other. In such circumstances the Judge may speak strongly, and point out plainly what is the duty of the jurymen; and if they ignorantly or perversely disregard his counsel, and find without evidence or against evidence, the injured party has his remedy, and the law is prompt to rectify the wrong. But I am not aware of any principle, and cannot discover any authority, which can warrant the transfer of jurisdiction and the duty of judgment, on matters of fact formally submitted to a jury, merely because the case appears to the Judge to be conclusively established on the one side or the other."

Lord Penzance, at p. 1175: "There are no doubt cases in which there is either no reasonable evidence of the want of due and reasonable care in the defendants' conduct, or, if such want exists, of its connection with the accident in the relation of cause and effect, and in such cases it is the recognized and unquestioned duty of the Judge to withdraw the case from the jury, upon the simple ground that there is no evidence in support of the issue fit for them to take into their consideration."

And again at p. 1178: "If the accident was wholly caused by the plaintiff's own conduct, to the exclusion of any other cause, it could not in any degree have been caused by the defendants' negligence, and so the quality or character of the defendants' conduct, whether negligent or imprudent, or wise or careful, is wholly beside the question."

He then points out that there was evidence of negligence on the part of the defendants, in omitting to

sound the whistle and so give notice of the approaching train, and that it was impossible to say that the absence of this particular species of notice might not have influenced the deceased in attempting to cross the line, and so caused the accident. He next proceeds to discuss the proper way to deal with the question of contributory negligence, and shews that when that arises it presents an issue entirely distinct and separate from that of the defendant's negligence, the proof of the former being on the defendant just as that of the latter is on the plaintiff, and he concludes:

"Upon either of these issues it is competent to the Judge to say negatively that there is not sufficient evidence to go to the jury; but it is no more competent to him to declare affirmatively that one of them is proved than the other. In fact, there is no case that I am aware of, and certainly none was cited, relating either to actions of this kind or to any other form of action, in which the facts and the proper conclusions of fact to be drawn from them being in dispute, the Judge has been held entitled to tell the jury that they were bound to find the issue proved."

I do not think that any useful purpose can be served by referring to the judgment delivered by the dissentient Lords in this case. Cogent as are the reasons they advance in support of their views, the judgment of the Court is what we must now be guided by, and I think it is embodied in the extracts I have quoted. In effect it shews that the cases must be extremely rare in which, where there is evidence of negligence, a Judge can safely take it upon himself to say, on the part of the defendant, that the contributory negligence of the plaintiff is nevertheless the proximate cause of the accident.

In this case it appears that the plaintiff's driver, situated as he was within a few feet of the track when he started, had an unobstructed view of the track to the east, but on the west could not see up the line more than sixty-six feet.

In one part of the evidence as reported, he says: "He knew this train was in, and had waited some time for the passenger train; he looked both ways; that he was looking out; that it was impossible to see. He looked out to see

at all was right. That when he started, the first he saw the train was starting; that it was about ten feet away when he saw it." Elsewhere he says: "That when he moved off he went on a trot; he looked right before him; he was struck at the moment; looked that the crossing was near, and then went ahead." There is no satisfactory evidence as to what rate of speed the train was going; a witness thought, though he would not swear, that it was going at the rate of eight or ten miles an hour.

Now it seems to me that it was for the jury to say what were the proper conclusions of fact to be drawn from this evidence. Did the driver look out both ways, as he says he did; if he had done so, could he have seen the train approaching in time to pull up his horses before reaching the track. If the driver knew this train was in, did he attempt to cross because, not hearing the whistle sound, or other intimation of the advancing train, he did not think it was coming, or did he drive across recklessly, not stopping or thinking whether it was coming or not, so that there was no connection between the defendants' want of care and the accident complained of.

I do not wish by any means to be understood as implying that the jury ought, under the circumstances, to draw any inferences favourable to the plaintiff on this point. Had there been a verdict for the defendants it is unlikely that we should have disturbed it, and it may be that the learned Judge will think it a proper case in which to exercise a discretion to dispense with a jury at a future trial.

As the case stands, however, I think the verdict was wrong, and that the appeal should be allowed, with costs.

GALT, J., concurred.

Appeal allowed.

AUSTIN v. DAVIS.

Tavern keeper—Supplying liquor after notice not to do so—Principal and agent—R. S. O. ch. 181—Assessing damages.

The plaintiff, whose husband was in the habit of drinking intoxicating liquors to excess, gave notice to the defendant, a duly licensed inn-keeper, forbidding him to supply liquor to her husband; in consequence of which the defendant forbade his bar-keeper (his son) furnishing liquor to the husband, but the bar-keeper notwithstanding did serve the plaintiff's husband with liquor in the tavern kept by defendant.

R. S. O. ch. 181, sec. 90, enacts that if the person so notified delivers or suffers to be delivered any such liquors to the person named in the notice, the person giving such notice may recover from him not less than \$20, nor more than \$200, to be assessed by the Court or jury as damages.

Held, that defendant was liable.

Hugill v. Merrifield, 12 C. P. 264, overruled.

This Court on appeal directed a verdict to be entered for the plaintiff, but referred it back to the Judge of the County Court to assess the damages, declining to follow the course adopted in *Denny v. The Montreal Telegraph Co.*, 3 A. R. 628.

THIS was an appeal from the judgment of the County Court of the County of Norfolk, refusing to set aside the judgment entered for the defendant and to enter a verdict for the plaintiff.

The action was commenced by writ dated 13th November, 1880, at the instance of Margaret Austin against William Davis.

"For that on, to wit, the twenty-fourth day of September, 1880, the plaintiff, then and still being the wife of one Joseph Austin, a person who before and on the day last aforesaid had, and at the time of the accruing of the cause of action, hereinafter stated, had the habit of drinking intoxicating liquor to excess, did give a notice in writing signed by her, to the defendant, who then was and from thenceforward had been and still is a person licensed to sell, and who at the time aforesaid did sell intoxicating liquor, not to deliver intoxicating liquor to the said Joseph Austin; yet the defendant, after being so notified as aforesaid, did within twelve months after such notice, to wit, on the twenty-fifth day of September, 1880, and on divers other days, and within six months before the commencement of this suit, by himself and by his clerk, servant and agent, otherwise than in the terms of a special requisition for medicinal purposes, signed by a Licensed Medical Practitioner, deliver, and in the building occupied by him the defendant, and wherein such liquor was sold, suffer to be delivered such liquor to the said Joseph Austin; whereby, and by virtue of the statute in that behalf, an action has accrued to the plaintiff."

The plaintiff claimed \$200.

The defendant pleaded "not guilty, by statute 21, Jac ch. 4, sec. 4."

After hearing the evidence in the cause at the trial the learned Judge found :

"(1) That the plaintiff caused the defendant to be served with the notice required by the statute ; (2) that Joseph Austin, the husband of the plaintiff, had the habit of drinking intoxicating liquors to excess ; (3) that the bar-keeper of the defendant served liquor to plaintiff's husband within the building occupied by the defendant, and wherein liquor was sold, within twelve months after the service of the said notice, and within six months of the bringing of the within action, otherwise than in the terms of special requisition for medical purposes, signed by a licensed medical practitioner ; (4) that after the said notice was served on the defendant, and before such liquor was served to the plaintiff's husband by the defendant's bar-keeper, the defendant instructed the said bar-keeper not to furnish liquor to the plaintiff's husband, and that such liquor was served to the plaintiff's husband without the knowledge of the defendant."

and ordered judgment to be entered for defendant, but that it should not be entered until the 4th of January, 1882 ; and refused the defendant his costs of the litigation.

Subsequently the plaintiff moved to set aside the judgment entered for the defendant, and to enter a judgment for the plaintiff, which was refused, and thereupon the plaintiff appealed to this Court, on the grounds :

(1) That the learned Judge, having found that liquor was supplied to Joseph Austin (contrary to the terms of the notice served upon defendant) by the servant and agent of the defendant, the judgment should be for the plaintiff, and (2), that the evidence shewed that defendant's son, who supplied the liquor in question, was the agent and servant of defendant, and although he might have acted contrary to the defendant's instructions, the defendant was liable for his act in supplying said liquor in the usual course of his employment, the same being under his control.

The appeal came on for argument on the 6th of September, 1882.

Falconbridge, for the appellant.

Oster, Q.C., for the respondent.

The cases cited appear in the judgment.

September 16, 1882. WILSON, C. J.—The defendant is not at liberty to dispute the finding of the learned Judge that the bar-keeper of the defendant did serve liquor to the husband of the plaintiff.

That finding is conclusive so long as it is not moved against, and the mere fact that the plaintiff moves against the verdict upon other grounds, does not authorize the defendant to dispute the correctness of the finding as to his furnishing the liquor.

If the defendant could dispute it, we should not be able to give effect to his objection that there was no evidence or not sufficient evidence to support it. We think there is evidence to sustain the finding.

The only remaining question is, whether a sale by the bar-keeper of the defendant, made against the express order of the defendant, is an act for which the defendant is liable under the R. S. O. ch. 181, sec. 90.

That section enables certain persons to give notice to any person licensed to sell, or who sells or is reputed to sell intoxicating liquors, not to deliver to the persons therein referred to intoxicating liquor who have the habit of drinking intoxicating liquor to excess. And among those persons it is enacted that the wife may give such notice not to deliver such liquor to her husband. "And if the person so notified at any time within twelve months after such notice either himself or by his clerk, servant, or agent, otherwise than in terms of a special requisition for medicinal purposes, signed by a licensed medical practitioner, delivers, or in or from any building, booth, or place occupied by him, and wherein or wherefrom any such liquor is sold, suffers to be delivered any such liquor to the person having such habit, the person giving such notice may, in an action as for personal wrong (if brought within six months thereafter, but not otherwise) recover from the person notified such sum, not less than \$20, nor more than \$200, to be assessed by the Court or jury as damages," &c.

Was the liquor which was delivered by the defendant's bar-keeper delivered or suffered to be delivered by the defendant, although the bar-keeper delivered it to the person the defendant had forbidden him to give it to, and so against the express orders of the defendant?

The rule is, that the master is responsible civilly for the acts of his agents and servants which they do in the course of their employment in his service, and for his purposes and benefit: *Limpus v. London General Omnibus Co.*, 1 H. & C. 526. And an agent or clerk selling articles in which the master deals in his master's shop, is clearly an act within the scope of the servant's authority, and his act is the act of his master: *The Attorney-General v. Siddon*, 1 C. & J. at p. 226.

If in this case the bar-keeper had given to the husband of the plaintiff unwholesome whiskey, which the defendant kept there for sale, and the husband had suffered from the unwholesome quality of the drink, the defendant would have been answerable for the consequences of the bar-keeper's sale, although forbidden to sell to him.

The mere forbidding of the clerk, agent, or servant, by the master to do the particular act does not lessen the master's responsibility for the act of his subordinate, so long as that subordinate is in the service of the master, and the act is one which is done in the service and for the purposes and benefit of the master.

Here the bar-keeper was certainly acting in the due course of his service and employment, and for his master's benefit and profit, when he sold the liquor to the plaintiff's husband. The defendant is, therefore, liable for the act, unless the direction given by the defendant to the bar-keeper, not to sell it to that particular person, relieved the defendant from all responsibility for the bar-keeper's direct disobedience of that order.

And according to the numerous authorities on the subject, and to the reason and nature of things in such a case, the mere direction by the master to his servant not to do a particular act, does not and should not relieve the

master from responsibility for his servant doing it in violation of his order, so long as the servant is in the ordinary and general discharge of his master's duty and business, and is kept and retained there for that purpose.

The public know nothing of these private instructions and cannot be expected to know of them. They only know there is a person in charge who is to perform a certain duty and who is performing it; and it is from that state of things, and not from private instructions curtailing or affecting that duty, that the responsibility arises.

If the defendant had directed his bar-keeper to sell temperance beverages only and not spirituous liquors, but yet had spirituous liquors for sale, which the bar-keeper had it in his power, although he had not the right to sell them—the defendant reserving the sale of such liquors to himself—the defendant would be answerable for the sale of spirituous liquors by his bar-keeper just as if he had made sale of them himself.

So a direction by the defendant to his bar-keeper not to sell spirituous liquors to any old man or young person, or to any coloured person, or to a woman, and the like, will not free him from responsibility if the bar-keeper sell to such person in disregard of these orders.

The cases are all agreed upon that point, 'excepting the one of *Hugill v. Merrifield*, 12 C. P. 269, referred to and relied upon by the learned Judge in his judgment in the Court below. The language of that case intimates that a sale by the servant or agent against the directions of the employer does not bind or affect the employer, but that opinion or intimation of opinion is not, I think, sustained or sustainable by the authorities.

This is not a criminal case, so the rule which holds the principal liable for the acts of the agent has full force.

There are many cases in which a penalty may be enforced against the principal for the act of his agent: *Attorney-General v. Siddon*, 1 Tyr. 41, S. C. 1 C. & J. 224; *Regina v. Stephens*, L. R. 1 Q. B. 702.

We are of opinion that the defendant is liable for the

le by his bar-keeper, although made contrary to the orders of the defendant, and that he is liable for such sale, although the words of the Act are, *deliver or suffer to be delivered any such liquor* by himself or his clerk, servant, agent, for the defendant does *suffer* the liquor to be delivered by his bar-keeper just as much as he suffers him deliver it. He is put in a place, position, and office, for the express purpose of selling such liquor, and that in my opinion is a suffering by the defendant of his bar-keeper sell.

It is said: "We suffer and tolerate what we object to, but do not think proper to prevent. We suffer things for want of ability to remove them:" *Crabbe's Synonyms*.

The declaration may be bad for not alleging the defendant well knew Joseph Austin. It should have alleged each fact, and that knowing him he, the defendant, delivered the liquor to him, and that the said Joseph Austin was the person he was required and notified not to sell the liquor to. With that we have, however, nothing to do. The learned Judge below has not assessed the damages to the plaintiff under the statute, which are to be not less than \$20, nor more than \$200," and the case must be remitted to him for that purpose.

I have no doubt that he may still assess them. In many cases damages omitted to be assessed by one jury may be assessed by another jury. In some cases if a jury omit to assess the damages another jury cannot assess them. Here the Judge is the same person who gave the verdict. I do not feel disposed to follow the case of *Denny v. The Montreal Telegraph Co.*, 3 App. R. 628.

The damages are discretionary, and this Court cannot exercise the discretion which the Judge who tried the case is alone to exercise.

As well might the Court upon the removal of a conviction by a magistrate impose a discretionary fine, which the magistrate alone can determine.

I do not know what discretion the learned Judge may exercise, and our discretion may not be his discretion. We cannot, therefore, govern him.

We allow the appeal with costs, and remit the case to the Court below or to the learned Judge to assess the damages.

OSLER, J.—A construction should, if possible, be placed on the 90th section, which will carry out the evident intention of the Legislature, and not one which will render it entirely illusory. The object of the section is to prevent the sale and delivery of intoxicating liquors to inebriates, and the notice forbidding it may be given to the person licensed to sell, or who sells, or is reputed to sell such liquors. Clearly, the person to be notified is the master or owner of the business, and not the mere clerk or servant employed, it may be for a day, or a longer or shorter period.

A right of action is there given against such person for any contravention of the notice in these terms: "And if the person so notified * * * either himself or by his clerk, servant, or agent * * * delivers, or in or from any building, booth or place occupied by him, and wherein or wherefrom any such liquor is sold, *suffers to be delivered*, any such liquor to the person having such habit, the person giving the notice may, in an action as for personal wrong, recover," &c.

Each of these alternatives must, it appears to me, receive the same construction; the words "either by himself or by his clerk, servant or agent," governing them both. I do not think the expression "*suffers to be delivered*," in the second alternative, necessarily implies personal knowledge of or conscious permission by the master of the forbidden act, where that is done by his servant; nor can there be one rule for cases where the delivery is general, and another for cases where it takes place from the building, booth, &c., occupied by the master, and wherein or wherefrom such liquor is usually sold. I think the section should be read thus: "And if the person so notified, either himself, or by his servant, &c., in or from any building, &c., delivers, or *suffers to be delivered*," &c.; and that the only question for consideration, where the delivery is by the servant, is

the usual one, whether the act is one for which the master is responsible.

It makes no difference in the master's responsibility that the action to which he may be subjected by the servant's act is a penal action, or in the nature of one.

In the *Attorney-General v. Siddon*, 1 C. & J. 220, an information for penalties for breach of the revenue laws, the master was held liable for the illegal act of the servant done during his absence, but in the conduct of the business. And in *Regina v. Stephens*, L. R. 1 Q. B. 702, the owner of works carried on for his profit by his agents, was held liable to be indicted for a public nuisance caused by acts of his workmen in carrying on the works, though done by them without his knowledge and contrary to his general orders. The Court were careful in that case to point out that the general rule that a principal is not criminally answerable for the acts of his agent was not infringed, all that was decided being, that where a person maintained works by his capital, and employed servants, and so carried on the works as in fact to cause a nuisance to a private right for which an action would lie, if the same nuisance inflicted an injury upon a public right, the remedy for which would be by indictment, the evidence which would maintain the action would also support the indictment.

In *Regina v. King*, 20 C. P. 246. the defendant was convicted for selling liquor without license. Hagarty, C. J., said: "If it be contrary to law to sell liquor, or any other article in a shop, the keeper of the shop is, we think, responsible for any sale made by any clerk or assistant in his shop; *prima facie* it would be his act. It may be if he could shew that the act of sale was an isolated act wholly unauthorized by him and not in any way in the course of his business, but a thing done wholly by the unwarranted or wilful act of the subordinate, that he might escape personal responsibility."

The rule of law is nowhere more clearly stated than in the leading case of *Limpus v. The London General Omnibus Co.*, 1 H. & C. 526.

The test of the master's liability is this: Was the act within the scope of the servant's probable authority in the course of his service and employment, and for his master's purposes? If it was, the latter is responsible, although it may have been done contrary to his express orders.

In the case referred to, the driver of the defendants' omnibus had driven it across the road in front of a rival omnibus, to prevent it from passing him. The defendants had given instructions not to obstruct any omnibus. Willes, J., p. 538, says: "It is well-known that there is virtually no remedy against the driver of an omnibus, and therefore it is necessary that for an injury resulting from an act done by him in the course of his master's service, the master should be responsible, for there ought to be a remedy against some person capable of paying damages to those injured by improper driving. This was treated by my Brother Martin as a case of improper driving, not a case where the servant did anything inconsistent with the discharge of his duty to his Master, and out of the course of his employment. * * It may be said that it was no part of the duty of the defendants' servant to obstruct the plaintiff's omnibus, and moreover the servant had distinct instructions not to obstruct any omnibus whatever. In my opinion those instructions are immaterial. If disobeyed, the law casts upon the master a liability for the act of his servant in the course of his employment; and the law is not so futile as to allow a master, by giving secret instructions to his servant, to discharge himself from liability. Therefore, I consider it immaterial that the defendants directed their servant not to do the act. Suppose a master told his servant not to break the law, would that exempt the master from responsibility for an unlawful act done by the servant in the course of his employment? * * The summing up is in accordance with the principle, that a master is liable for acts done by his servant in the course of his employment. It is also consistent with authority. I need only refer to the judgment of Lord Holt, in *Tuberville v. Stampe*, 1 Lord Raym. 264, and of Lord Wensleydale in *Huzzey v. Field*, 2 C. M. & R. 432."

Byles, J., p. 540, said : " The direction amounts to this, that a servant acts in the prosecution of his master's business for the benefit of his master, and not for the benefit of himself, the master is liable, although the act may in one sense be wilful on the part of the servant."

Blackburn, J., points out that the direction given to the jury was a sufficient guide to enable them to say whether the particular act was done in *the course of the employment*, and that they were told that if they were of opinion that the true character of the act of the servant was that it was an act of his own, and in order to effect a purpose of his own, the defendants were not responsible.

In *Bayley v. Manchester R. W. Co.*, L. R. 7 C. P. at p. 420, Willes, J., says : " A person who puts another in his place to do a class of acts in his absence necessarily leaves him to determine according to the circumstances that arise when an act of that class is to be done, and trusts him for the manner in which it is done; and consequently he is held answerable for the wrong of the person so intrusted, whether in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done, provided that what was done was done, not from any caprice of the servant but in the course of the employment." See also *Betts v. De Vitre*, L. R. 3 Chy. pp. 441, where the law is laid down in the same way by Lord Chelmsford.

These authorities, and others which might be cited, appear to me to cover the case before us, and to make it possible for us to hold that the defendant is not responsible for the act of his servant in delivering liquor to the plaintiff's husband. It was an act done in the course of his employment as bar-keeper and for his master's benefit, for he no doubt received and accounted to the latter for the price of the liquor. He was there entrusted to do a class of acts, viz., to sell liquor to persons who called for it, but he did one of such acts under circumstances in which he ought not to have done it, and contrary to his master's express orders; yet not having done it for mere caprice or

to serve a purpose of his own, this will not excuse the master. Hardly as it may bear upon him in some instances, and this is one, it is only right that the rule should be so, for the adoption of any other would enable the master to evade the law with impunity, merely by giving orders to his servant not to break it. Take the case of a large tavern or inn, in which perhaps the licensee never personally sells liquor in the bar, but entrusts everything to the servant. How futile it would be to serve a notice on the licensee if he could relieve himself from responsibility by shewing that he had instructed his servant to observe it. He must protect himself by employing trustworthy servants, or take the risk of untrustworthy ones disobeying his orders.

The case of *Hugill v. Merrifield*, 12 C. P. 269, certainly cannot well be distinguished from the present, but it would probably have been differently decided if *Limpus v. The London General Omnibus Co.*, 1 H. & C. 256, had been then reported, for the direction given to the jury, which was held too broad in the former case, was in almost the same terms, so far as the point now in question is concerned, as that which was upheld in the latter.

I may add that having examined the reports of numerous cases which have arisen upon the liquor license laws in several of the United States, which contain provisions somewhat similar to those of section 90, I find that the law as to the master's liability for the act of his servant under similar circumstances is laid down in accordance with the views above expressed. These cases will be found collected in *Cooley on Torts*, pp. 243, *et seq.*

I agree that the appeal should be allowed, and that the case should be sent back to the learned Judge, with a direction that the plaintiff is entitled to recover such sum as upon the evidence he may think her entitled to within the limits fixed by the Act. Difficult as it may be in this case to suggest a reason why the defendant should be made to pay a larger sum than the minimum of \$20, I do not think we should assess the damages. The fact that the Judge who tries the cause has a discretion to exercise as to

e costs of the suit, which we cannot dispose of, is a
fficient reason for not following the precedent set in
enny v. *The Montreal Telegraph Co.*, 3 A. R. 620.

GALT, J., concurred.

Appeal allowed.

MCLEAN V. PINKERTON.

Chattel mortgage—Registration—R. S. O. ch. 119—Sunday—Future advances—Time of payment.

A chattel mortgage was duly executed on the 12th of July and filed on the 18th, the 17th having been Sunday :

Held, [affirming the judgment of the County Court,] that such registration was too late, the Act, R. S. O. ch. 119, requiring the same to be effected within five days from the execution of the instrument; that Sunday counted as one of such five days, and that Rule 457, O. J. A. did not apply.

The mortgage, besides being a security for \$1,400 actually advanced, provided that it should also be a security for further advances, if necessary, of goods and merchandize to enable the mortgagor "to carry on business,"—not "to enter into and carry on" as in the statute,—which should "be re-paid on demand at any time within one year from the date hereof, or such other time as the parties may agree thereto."

Held, that the omission of the words "to enter into" could not render it unnecessary to register the mortgage, as regarded the \$1,400.

Quære, per WILSON, C. J., whether the clause for future advances was not void as enabling payment to be delayed beyond the year.

This was an appeal by Daniel McLean, claimant, from a judgment pronounced by his Honor Judge Dean, Judge of the County Court of the County of Victoria, on the 28th day of April, 1882, in the matter of an interpleader issue, finding the issue therein joined in favour of the respondents, Pinkerton & Co., who were execution creditors of one Agnew, and against the claimant, who claimed under a chattel mortgage executed by the execution debtor.

The indebtedness of Agnew to the plaintiff was clearly shewn, and the only question was as to the filing the mortgage in the proper office.

It was shewn that the plaintiff's agent went from Toronto to Fenelon Falls, and that Agnew there, on the 11th July, signed a printed form of chattel mortgage, and gave the agent a list of the articles to be inserted in it; instructing the agent to have the mortgage filled up and delivered to McLean. This was afterwards done by McLean's solicitor on the 12th, and the mortgage formally delivered to him by the agent on behalf of Agnew, and the solicitor on the 16th posted it to be filed by the county clerk.

The chattel mortgage was expressed to be for \$1,400, and the mortgagee swore that the mortgagor was justly and truly indebted to him in that sum.

The mortgage was in the usual form, with the exception of the following two additional clauses :

"Provided also, that these presents are also a security for further advances if necessary to be made by the mortgagee to the mortgagor, of goods and merchandize to enable him, the mortgagor, to carry on business with such advances, the amount whereof shall not exceed the amount mentioned herein, and the re-payment of which, with the interest at the rate herein named, shall be made on demand at any time within one year from the date hereof, or such other time as the parties may agree thereto."

"It is hereby agreed, and is the intention hereof, that these presents shall be and continue at all times a security for all claims of the mortgagee against the mortgagor, and shall not be discharged or considered satisfied until all indebtedness (is) paid, whether now or hereafter to be incurred."

The evidence shewed distinctly that the mortgage, although dated on the 11th of July, 1881, was in reality not executed until the 12th; and that it was filed in the proper office on the 18th, the 17th falling on a Sunday.

His Honor, after stating the facts as above set forth said :

"This mortgage, as between the parties to it, is a good mortgage for \$1,400—the pre-existing debt—and nothing more. Does, then, the addition of the clauses which really import no consideration into the instrument vitiate it as against creditors, in not complying with the statute? Are they anything more in effect than any other inapt words which have no business there, but signify nothing?

"If they are not, then we must regard this as a mortgage for a pre-existing debt duly executed and duly sworn to. I do not think it necessary, however, to decide this, for, in my opinion, if the mortgage is held good for \$1,400, there is a fatal defect in the filing."

His Honor then held that it was filed too late, and that it having been posted in time could not avail.

The appeal came on for argument on the 18th of September, 1882.

Rose, Q.C., and *F. Hodgins*, for the appellant, contended that the mortgage in question did not require registration, the proviso for future advances not being in accordance with the statute, and the respondent's execution was,

therefore, postponed to it; and that, under the circumstances, it was registered in time, the Judge below having correctly found that it was executed on the 12th of July, 1881; the 17th of July being a Sunday, it was in time when registered on the 18th of the month. They also contended that as the mortgage was deposited in the post-office on the 16th of July, there was a sufficient delivery to the clerk by the claimant, and that the delivery was therefore complete on the 16th.

Gibbons, for the respondent, insisted that the mortgage in question came clearly within the statute, and required registration; that the affidavits shewing the execution of the mortgage by the grantor proved that it was executed at the village of Fenelon Falls. The affidavit, he contended, was either incorrect and the mortgage void for want of an affidavit of execution, or else the execution at Fenelon Falls must be taken to be the only and complete execution by the grantor. The evidence established that the mortgage was executed at Fenelon Falls by the grantor on its date, the 11th of July. All that was done at Fenelon Falls was done on the 11th. The registration therefore was too late, as the actual date of the filing must govern; and even if admitted that the instrument was executed on the 12th of July, the registration or filing was too late.

The cases cited appear in the judgment.

September 16, 1882. WILSON, C. J.—This chattel mortgage was not given until the 12th of July. Assuming it to have been then a valid instrument, and free from the objections which have been made to it, it should have been registered on the 17th of July at the latest.

That day fell upon a Sunday, and the plaintiff did not register it until the following day. The defendant contends the registration was too late, and that the fact of the last of the five days falling on a Sunday was and is no reason in law why the plaintiff should have a longer time for the registration than the statute expressly allows to him.

The R. S. O. ch. 119, sec. 1, says, the mortgage or a true copy thereof, "shall within five days from the execution thereof," be registered; and sec. 4 declares that every mortgage "not registered as hereinbefore provided, shall be absolutely null and void as against creditors of the mortgagor," &c.

Rule 457 provides that when the time for doing any act or taking any proceeding expires on a Sunday or other day when the offices are closed, and by reason thereof such act or proceeding cannot be taken on that day, the act or proceeding, so far as the time for doing or taking the same is concerned, shall be held to be duly done or taken, if done or taken on the day when the offices shall next be open.

Morris v. Richards, 45 L. T. Rep. N. S. 210, is a decision that if the last day of the period fixed by the Statute of Limitations fall on a Sunday, the party has not until the following day within which to bring his action; and that the order of the Judicature Act LVII. r. 3, of which our Rule 457 is a copy, does not apply to such a case.

In *Regina v. Justices of Middlesex*, 7 Jur. 396, it was held that when a statute directed notice of appeal from the conviction by a magistrate to be given within six days after the cause of complaint, that a notice served on the 1st of May against a conviction on the 2nd of May was too late. The question was, whether Sunday the 8th day of May was to be reckoned as one of the six days or not.

Williams, J., said the plain words of the statute cannot be got rid of, there were five clear days in which the notice might have been served, but the appellant chose to neglect them and to raise this discussion.

In *Rouberry v. Morgan*, 9 Ex. 730, the like decision was given upon a statute which expressly declared that in case of non-appearance to a specially indorsed writ, the plaintiff might sign judgment and issue execution at the expiration of eight days from the last day for appearance, and not before.

There the eighth day fell on a Sunday, and it was held

that Sunday must be reckoned as one of the days, and that the rules of Court excluding the Sunday in general matters of practice, could not alter the express terms of the Act of Parliament.

In *Peacock*, appellant v. *The Queen*, respondent, 4. C. B. N. S. 264, it was held that, where the statute required that either party dissatisfied with the determination of the Justices, might apply in writing within three days after such determination to the Justices to state and sign a case, that Sunday being the last of the three days was not to be excluded, and that the party should, at latest, have applied on the Saturday. *Ex parte Simpkin*, 6 Jur. N. S. 144 is to the like effect.

In *Hughes v. Griffiths*, 13 C. B. N. S. 324, it was held that if the last day of a specified time expire on a Sunday or other holiday, and the act is to be done by the Court and the Court is closed upon that day, and cannot act, the party has until the next following day on which the Court can act.

In this case the registration of the chattel mortgage was the act of the party, and the statute says plainly it shall be registered within five days from the execution thereof, and if not it shall be void as against creditors.

The cases which have been referred to shew that when Sunday is the last day for the party to do an act, and the defined time is fixed by statute, Sunday is a part of the specified time, and a further day is not given to the party because he does not do the act or cannot do it upon the Sunday.

The case in 13 C. B. N. S. 324 is distinguishable, for there the writ had to be issued by the Court; whether it is a satisfactory distinction or not need not be considered.

We must hold that the chattel mortgage in this case was not registered in due time.

Mr. *Rose* contended that the mortgage was not within the Chattel Mortgage Act, and did not require registration, because it provides for making future advances, if necessary, of goods and merchandise to enable the mortgagor to

carry on business with such advances, while the statute speaks of such advances being for the purpose of enabling the mortgagor "to enter into and carry on business."

If the fact of the omission of the words *to enter into business* from the mortgage can have the effect of withdrawing the whole of the instrument from the provisions of the Act, it would be a very short and convenient method of defeating the Act altogether when the mortgage related only to future advances, or of defeating it when it related to an actual existing debt which was also secured by the mortgage.

If lands and chattels are contained in the same instrument, it need not, according to this argument, be registered either as to the lands or as to the goods. Or if growing crops and ordinary chattels are included in the one document, there need be no registration, according to this argument, of the instrument to protect the ordinary chattels, because the growing crops do not require registration to protect them.

We do not give effect to this argument. There were no future advances made here, and as to the subsisting debt, the mortgage should have been duly registered to protect the chattels conveyed to secure it.

The clause for future advances is probably void altogether, because it provides for the payment of such future advances, on "demand, at any time within one year from the date hereof, or such other time as the parties may agree hereto," which might extend beyond the year, while the statute restricts the time of payment to the one year.

The appeal, we think, must be dismissed, with costs.

OSLER, J.—This case cannot, in my opinion, as regards one of the principal questions involved, be distinguished from the cases of *Rowberry v. Morgan*, 9 Ex. 730; *Regina v. The Justices of Middlesex*, 7 Jur. 396, and *Ex parte Simpkin*, 6 Jur. N. S. 144, in which it is distinctly determined that when by statute a certain number of days is given for doing any act, the last of which happens to

fall on a Sunday, that day is in such case included in the time given, and the party has no further time to do the act unless the statute expressly provides that it may be done on the day following.

As to the other point: assuming that the mortgage is one which, as to the future advances contemplated thereby, does not come within the Act so as to be capable of registration, owing to the peculiar terms of the agreement as to such advances, no authority was cited or, so far as I am aware of can be found, for the proposition, that it was therefore outside of the Act so far as it professed to be a security for moneys actually advanced and due at the date of its execution, and in respect of which only it is set up and brought in question. Nor in my opinion is there any thing which makes it necessary or reasonable to place a construction upon the Chattel Mortgage Act, by which its requirements could in every case be evaded at pleasure.

I agree that the appeal should be dismissed, with costs.

GALT, J., concurred.

Appeal dismissed.

STOESER V. SPRINGER.

Replevin—Fraudulent Purchase—Disaffirming Sale.

M., by false representations, induced T. to sell to him a horse, buggy, and harness, and to take for them two promissory notes. T. having discovered the fraud, went and demanded back his goods, at the same time throwing the notes on the table. On the assurance of M., however, that on the following Tuesday he would bring the property or satisfaction, T. again took the notes and went away. M. did not appear as he had promised, and T. sued out a writ of replevin against M., but, before it had been executed, M. sold the property to plaintiff, an innocent purchaser, who, having been deprived of it under the replevin, brought trover against the sheriff:

Held, that the plaintiff was entitled to recover; that the contract had not been disaffirmed when the writ of replevin issued, and that the mere issue of it was no notice to M. of disaffirmance, and could not affect the plaintiff.

Held, also, following *Great Western Railway Co. v. McEwan*, 28 U. C. R. 528, 30 U. C. R. 559, that the defendant, as sheriff, having taken the property out of the plaintiff's possession, could not justify under the writ of replevin.

THIS was an appeal from a judgment of his Honour the Junior Judge of the county of Waterloo, directing judgment to be entered for the plaintiff for \$15 and costs; and from a subsequent judgment of the same learned Judge, refusing an order to set aside the judgment directed to be entered for the plaintiff, and to enter a nonsuit or verdict for the defendant.

The action was in trover for one single buggy and one set of single harness.

The defendant pleaded (1) not guilty; (2) goods not plaintiff's; (3) that the goods were obtained by plaintiff from one Markle, who got same from one Tyson under fraudulent circumstances, and with the preconceived design of not paying for them, and that before sale by Markle to the plaintiff, Tyson disaffirmed the sale; (4) that the goods were the goods of Tyson, whose agent defendant was; (5) justification by defendant as sheriff under a writ of replevin in the suit of *Tyson v. Markle*.

At the trial the plaintiff was examined on his own behalf and, swore that he was agent for the Globe Manufacturing Company; and was suing for a horse, buggy, and

harness; that on the 19th of October he had purchased from one J. B. Markle, at St. Agatha; that he had met him there and gave him \$50 and his buggy and harness in exchange; paid the cash the same evening. This was in the afternoon. He had the buggy from Wednesday the 19th to Saturday following. On Saturday the plaintiff and his father came to Berlin with the buggy and harness and his horse, and put the horse, buggy, and harness in the stables at Keefer's hotel. They went out and met Klippert. He told plaintiff to give up that buggy, which he refused to do as it was his property. Klippert and another person took them.

The plaintiff further swore :

"I told the sheriff, as I had to give the harness up, to take it, but that I would look after him. The first I heard of trouble was by my brother's wife, who said that people would say he stole them. This was after the trade. Markle told me after this that it was all right, he bought and paid for them, gave notes. I had no idea there was anything wrong. I have not got my buggy and harness back."

John Tyson was called on behalf of the defendant, and swore that he knew Markle fifteen or twenty years ago.

"I saw him on 5th October last at Guelph. I had an animal to sell. Markle introduced himself, and said he was open to buy one. He asked me to see it. He came to my house in company with me. He saw the mare, sorrel. He said he would rather buy a whole rig. I agreed to sell him. He asked me what I would take for the rig. We effected a sale. I asked him \$160 for horse, buggy, and harness. No sum was put on each article. \$160 for whole rig. Buggy, \$100; horse, \$45 or \$50; balance, harness, \$10 or \$15. He said he had no money; had a note, as good as cash, against a responsible farmer—person had been a farmer, now speculating in landed property; that if he owed \$500 he would pay. He produced the note for \$120, made by Peter Wenger in favour J. B. Markle or bearer, dated 4th January, 1881, at 7 months; interest at 6 per cent. He gave me his own note for \$40. Then, as to his own responsibility, he said he was able to pay it when it became due, and had money coming to him in a few days. I at that time knew nothing about his or Wenger's circumstances. I relied on the promise he made as to his ability and Wenger's responsibility, and the notes. He said everything was right. On the following day, in consequence of something I heard, I went to Elmira on the 6th to get my property back, or such satisfaction as he could give. I saw Markle. I demanded the property from him in presence of my son. I told him he told me untrue, and I found things the reverse

what he told me. He hesitated about giving up the property. He said: It would not look well to see you drive the rig away; that he had reputation to keep up; but to rest contented, and that he would go down to Guelph at the hotel on Tuesday following, and that he would bring the property to Guelph or satisfaction. He never appeared. I had the notes in Elmira with me. I told him he had deceived me. I had known he had been in the Penitentiary. I tendered the notes to him in Elmira. I put them on the table. I afterwards picked them up and put them in my pocket."

His Honour delivered a written judgment, in which he stated:

"This is an action of trover brought by plaintiff under the following circumstances:—On the 5th October last, John Tyson sold at Guelph, where he lived, to one J. B. Markle, one horse, one buggy, and one set of single harness, for \$160, getting in payment therefor a promissory note made by one Peter Wenger, in favour of Markle, or bearer, for \$120, due on the following January, dated 4th June, 1881, with interest at 6 per cent.; also his own note for \$40, at one month, payable to Tyson, or bearer. It is alleged by Tyson that the sale was obtained by fraud, and that so soon as he discovered the fraud, on the day following the sale, he disaffirmed the sale; that Markle, after such disaffirmance sold the property to plaintiff; that before the sale he caused replevin to issue, and defendant as sheriff, to whom the writ was directed, replevied the property out of plaintiff's hands to Tyson. The plaintiff maintains that Markle had the right to sell to him, and that he was a *bona fide* purchaser.

"The questions to be determined in this action are:—(1) When Markle purchased the property in question from Tyson, did he make any representations knowing them to be false at the time? If so, (2) After Tyson became aware that the representations were false, did he disaffirm the sale? If so, (3) Was the sale before or after the disaffirmance, and if before, was he an innocent purchaser for value? (4) In what capacity was the defendant acting? * * * I have arrived at the following conclusions: (1) That Markle obtained the property from Tyson by representations, knowing them to be untrue, and Tyson acted in reliance on them. (2) That Tyson did not, before the sale from Markle to plaintiff, avoid the contract of sale between Markle and himself. (3) That if the demand of itself of the property by Tyson from Markle was an avoidance, Tyson relinquished the right he acquired to retake the property, and the position of the parties as to the ownership remained as it was before the demand. (4) I find the property to be of the value of \$115, and I award \$10 to the plaintiff as damages for the detention. And I direct judgment to be entered for the plaintiff for \$125 and costs; and that execution be stayed until the 5th of April next."

The defendant thereupon appealed on the following amongst other grounds:

(1) That the defendant being a public officer, was as such entitled to notice of action under the Revised Statutes of Ontario, ch. 73: *McDougall v. Peterson*, 40 U. C. R. 95. (2) That the defendant could properly justify under the writ of replevin. The case of *Great Western R. W. Co. v. McEwan*, 28 U. C. R. 528, was not binding upon this Court, and should not be followed. The practical effect of such a rule would be to render the execution of writs of replevin impossible in most cases. The form of the writ (R. S. O. p. 738,) requires the property to be replevied, without saying from whose possession the same is to be replevied. (3) That the defendant being a public officer, and not a mere wrong-doer, could set up the *jus tertii*. (4) That the evidence established that Markle obtained the goods in question from Tyson, with the preconceived design of not paying for them, and therefore Tyson had the right, on discovering the fraud, to disaffirm and avoid the sale: *Davis v. McWhirter*, 40 U. C. R. 598. (5) That the learned Judge having found as a fact, that Markle obtained the property from Tyson by representations which he knew to be untrue, and that Tyson had acted in reliance on them, it followed from this, that Tyson had the right, on discovering the fraud, to disaffirm and avoid the sale: *Stevenson v. Lewham*, 13 C. B. 285; *Kingsford v. Merry*, 11 Ex. 579; *White v. Gordon*, 10 C. B. 919; *Morrison v. Universal and Marine Ins. Co.*, L. R. 8 Ex. 197; *Clough v. London and North Western R. W. Co.*, L. R. 7 Ex. 26; *Load v. Green*, 15 M. & W. 216; *Croft v. Lumley*, 6 H. L. Cas. 705; *Young v. Billiter*, 6 E. & B.; *The Queen v. Middleton*, L. R. 2 C. C. R. 44; *Jones v. Carter*, 15 M. & W. 718; *Higgins v. Barton*, 26 L. J. Ex. 342. (6) And the sale having been disaffirmed, there could be no reaffirmance of it. The subsequent dealings of Tyson and Markle must be viewed by themselves, apart from the previous transaction, which was at an end. What took place was not sufficient to re-vest the property in the goods in Markle, but amounted simply to an agreement that Markle should have the possession of Tyson's horse,

&c., for a few days, when he was to return it unless they could agree on a price, and security: *Ross v. Eby*, 28 C. P. 316; *Isaac v. Andrews*, 28 C. P. 40; *Benjamin* on Sales, 3rd Am. ed. 285.

The appeal came on for argument on the 7th September, 1882.

McCarthy, Q.C., for the appellant.

J. K. Kerr, Q.C., for the respondent.

September 16, 1882. WILSON, C. J.—I think Tyson extended the time for Markle to return the property or to give satisfaction: that is to pay for it, or to give security for it, during which time it was Markle's property, and during which time he could sell it as a means of giving satisfaction.

That he did not give Tyson the satisfaction he promised to give, will not matter so far as third persons are concerned.

He sold the property to an innocent purchaser without notice, and was thus enabled to give to Tyson the satisfaction he had promised to give to him; but because he cheated Tyson is no reason why he should be allowed to cheat also the innocent purchaser, or why Tyson should take from the purchaser the property he enabled and authorized Markle to sell to him.

It was argued, that although that may be so, yet Tyson before the sale by Markle had issued his writ of replevin, which was an election by him to determine the sale to Tyson and an election, although the writ was not executed until after the sale by Markle, and which election Tyson could not waive or abandon.

That does not seem to be so. The mere issue of the writ was no notice to Markle of Tyson's election to determine the sale, and Tyson himself until he executed it could have abandoned the writ.

In *Woodfall's Landlord and Tenant*, 11th ed., p. 507, it is said: "By issuing and serving a writ of ejectment,

subject to this: that if in the interval whilst he is deliberating an innocent third party has acquired an interest in the property * * it will preclude him from exercising his right to rescind."

In that case the plaintiff claimed title through the fraudulent purchaser, and was asserting his right against the vendors of the latter by means of an action of trover. They were in the first instance defending the action on the untenable ground of a right to stop *in transitu*. It was held that they might, on discovering at the trial that the goods had in fact been obtained by fraud, then elect to rescind the contract and declare their intention to do so by a plea to that effect in the cause.

There, however, the plaintiff was a party to the fraud, and it was so averred in the plea. Had he been an innocent purchaser, or not privy to the fraud, it is clear that the defendants could not have availed themselves of such a defence at that stage.

If Markle or the plaintiff in privity with his fraud were here suing Tyson or the defendant, the case would be analogous.

So long as the writ of replevin remained unexecuted and the vendor had given no notice to Markle of his election to rescind, it was within the former's power to withdraw it, and there was no act of election either way. Such an act to be of any avail must be communicated in some way to the party to be affected by it: until then it exists only in intention and may be withdrawn: the vendor is still deliberating and the property may be acquired by an innocent purchaser. The principle, as the Court say in the case already quoted, is precisely the same as that on which it is held that the landlord may elect to avoid a lease and bring ejectment when his tenant has committed a forfeiture; and in *Jones v. Carter*, 15 M. & W. 718, it was said the bringing of an ejectment for a forfeiture, and *serving it on the lessee* in possession, must be considered as the exercise of the lessor's option to avoid the lease. See the observations on this case in *Scarf v. Jardine* L. R. 7

App. Cas. 360-1. See also *Newnham v. Stevenson*, 10 C. B. 713.

In the case before us the plaintiff acquired his title before the option of the vendor to rescind was communicated to the fraudulent purchaser, and he is therefore entitled to recover.

GALT, J., concurred.

Appeal dismissed, with costs.

LAMBIERE v. THE SCHOOL TRUSTEES OF SECTION NUMBER
THREE, SOUTH CAYUGA.

Public Schools Act—Contract of Trustees.

In an action by a school teacher to recover damages as for a wrongful dismissal, it was shewn that the agreement to employ the plaintiff was made in writing, under seal and signed by two, of the three school trustees, but not at the same time or at any meeting of the trustees called for the purpose of transacting school business.

Held, reversing the judgment of the County Court (Haldimand), that the agreement was void under sec. 97 of the Public Schools Act, which provides that "No act or proceeding of a school corporation which is not adopted at a regular or special meeting of the trustees, shall be valid or binding on any party affected thereby."

APPEAL from the County Court of the County of Haldimand.

The statement of claim was : (1) That the plaintiff was hired by defendants by a written agreement under seal dated 29th November, 1880, to teach their school from 1st January, 1881, to 31st December, 1881, at a salary of \$350; (2) That plaintiff entered into defendants employment on 1st January, 1881, and continued till 7th February, 1881, when she was wrongfully dismissed; (3) That plaintiff was ready and willing to continue in performance of her duties for the remainder of the year. And she claimed \$200 damages.

The defence was : (1) That the agreement was not considered and adopted at a regular or special meeting of defendants, as required by the School Law of Ontario; (2) That the agreement was signed by Nicholas Miller and Abraham G. Wismer, two of the trustees of said section, without being authorized as aforesaid; and Matthew Sniderhorn, the remaining trustee, did not receive any notice of any meeting at which the agreement was adopted.

The cause came on for trial at the sittings of the Court in December, 1881, when the plaintiff was examined on her own behalf, and swore that she taught school in said section at the rate of \$350 per annum, from August 18th to Christmas holidays, 1880; and that she made application

for a continuance in the same employment at an increased salary for the year 1881, which application was considered by the trustees, and the plaintiff was notified by two of them that the subject of such increase would be considered at a meeting of the trustees. A meeting was held at which plaintiff attended, and what took place there is sufficiently set out in the judgment. On the 31st of December, Mr. Sniderhorn, Charles Fredenburgh, and John Link, came to plaintiff's residence and informed her that Fredenburgh and Link had been elected in place of Miller and Wismer. They said they had come to make her an offer of \$300 per annum to teach the school, when plaintiff replied that she was already engaged at \$350, and they said they did not consider her engagement legal. They did not then forbid her to teach the school, and she began teaching again on the 3rd of January, and no objection was made to her doing so until the morning of the 10th, when she met Sniderhorn at the school house, who gave her a letter signed by the three trustees as follows :

"We, the undersigned trustees, do notify you that you are not legally employed to teach our school for the present year, and that we will not be responsible or liable for your salary."

It further appeared that the trustees had obtained the key of the school-house from the plaintiff, and locked her out ; and that from the 3rd of February until the 1st of September plaintiff had been out of employment, although she had continuously endeavoured during that time to obtain such.

The jury returned a verdict in favour of plaintiff for \$200 damages.

The defendants obtained a rule *nisi* to set aside this verdict, and to enter a nonsuit or verdict for the defendants, or to reduce the verdict in favour of the plaintiff to \$50 and Division Court costs, which, after argument, the learned Judge discharged. The defendants appealed.

The appeal came on to be heard on the 12th of September, 1882.

Robinson, Q.C., for the appellants. There was no valid agreement entered into between the plaintiff and the trustees, and such as is binding upon the defendants. Sec. 97 of the Public Schools Act R. S. O. ch. 204, points out distinctly in what manner school trustees must act so as to render valid any agreements they enter into. The Act never intended to authorize trustees to make a bargain in the manner shewn to have been pursued in this case. Their course was clear: they should have met together and passed a formal resolution appointing the plaintiff, and fixing the remuneration to which she was to be entitled. At the meeting held on the 26th of November, at which only two of the trustees were present, Miller refused to agree to the memorandum drawn up for the re-engagement of the plaintiff, because it did not contain a provision as to parties giving a month's notice for the purpose of determining the contract; and on his cross-examination, he states, "he did not make up his mind to sign the paper as it is." No entry was made of the matter in the minutes, so that the subsequent trustees were completely in the dark as to what was or was not agreed to, and there was no subsequent meeting at which the agreement was issued; *Anglin v. Nickle*, 30 C. P. 72; *French v. Dennett*, 4 C. B. N. S. 576; *Dillon on Corp.* (3rd ed.) secs. 300, 301.

Hardy, Q.C., for the respondent. The agreement under which plaintiff claims is in writing and under seal signed by two of the three trustees, which is sufficient, as section 99 of the School Act provides that any two of the trustees shall form a quorum. Upon the face of the instrument it appears to be binding, *Anglin v. Nickle*, referred to by the other side, is not a parallel case with this.

The Judgment of the Court was delivered on September 16th, 1882, by

GALT, J.—By sec. 97 of ch. 204, "An Act respecting public schools," it is enacted that "No act or proceeding

a school corporation which is not adopted at a regular special meeting of the trustees shall be valid or binding on any party affected thereby, and notice of the meeting shall be given by the Secretary to each of the trustees, or by any one of the trustees to the others, by notifying them personally, or in writing, or by sending a written notice to their residences."

It appears in this case that a meeting of the trustees had been called, to be held at the school-house on the 26th November, 1880, for the purpose of considering the application of the plaintiff for a re-engagement as school teacher for the year 1881, and for an increase to her salary. It appears that due notice of this meeting had been given to the three trustees. The meeting was to be held in the evening. At the time appointed the plaintiff was in attendance, and shortly after one of the trustees (Miller) came; after waiting a short time he said he must leave, and directed the plaintiff to remain, and to request the other trustees if they came to adjourn to his house. One of the others (Wismer) came; but the other (Sinderman) did not. After waiting a short time for him, Wismer and the plaintiff went to Miller's house.

The plaintiff's account of what took place is as follows on cross-examination:—"Miller refused to sign agreement on the night of 26th November because it did not contain provision as to the month's notice. He promised to consider the agreement as it was without this provision, and he thought it right he would sign it the next Monday evening. Miller signed the agreement the next Monday evening at his house. I was present. Neither of the other trustees were." In her examination in chief she said: "We went together (that is, Wismer and the plaintiff) to the house of the trustee, Mr. Miller. The question of my reappointment for the next year was then discussed by the two trustees, Wismer and Miller, and they decided to engage me at the same salary, \$350 per annum, and I agreed to accept it. The signing of the agreement was then postponed until Monday evening following. It was then signed by Miller, and Wismer not being then present, was sent by me, at Miller's request, the next day to Wismer, and was returned to me with Wismer's signature.

The agreement is that now produced." There is no dispute as to the truth of the foregoing statement.

We find then that a meeting of the trustees had been regularly called for the 26th of November, and assuming the view taken by the learned Judge to be correct, this meeting was adjourned to the house of Miller, but unfortunately for the plaintiff nothing was decided at that meeting. She says the trustees agreed to re-engage her at the salary mentioned, but they did not agree as to the terms of that re-engagement. No adjournment was made, nor was there any notice given to Sniderhorn, the other trustee, of any other meeting; in fact, no other meeting was held, but each of the two trustees who executed the agreement signed it separately. This, in our opinion, brings the case clearly within the words of the 97th sec. of the Act, which has been already set out, and this appeal must be allowed, with costs.

GRASS ET AL. V. AUSTIN.

Chattel mortgage—Description—After-acquired property.

I., owning parts of lots 13 and 14 in the 2nd concession of Murray, gave a chattel mortgage of certain crops, grain, hay, &c., described as "now being on the premises, situate on the north-east half of lot 14 in the second concession, and north half of lot 14 in the said concession of Murray."

Feld, that crops and hay upon lot 13 could not pass.

crops to be sown upon certain land may be the subject of sale as any other after-acquired property, and the property in them will pass when sown, if they are so described, as to be capable of being identified when acquired.

APPEAL from the County Court of Northumberland and Durham. An interpleader issue was directed in a suit of *Austin v. McCormick*, wherein the claimants Peter Grass and Ruliff Grass were plaintiffs, and the execution creditor the said Austin was defendant; and the question to be tried was whether at the time of the seizure of certain goods therein mentioned, the same were the property of the claimants Grass as against the execution creditor.

At the trial a verdict was rendered in favour of the plaintiffs, subject to the opinion of the Court on the whole case, and the learned Judge afterwards delivered judgment in favour of the plaintiffs.

The defendant appealed, and the appeal came on for argument on the 8th of September, 1882.

Bethune, Q.C., for the appellant, insisted that the chattel mortgage was void, as made to hinder and delay creditors, and as giving the respondent a preference over the other creditors of James McCormick: R. S. O., ch. 118, sec. 2, and 13 Eliz. ch. 5, secs. 1 and 2. The chattel mortgage covered everything the debtor James McCormick owned, even to the most trifling articles of household furniture, and the cases of *Fleming v. McNaughton*, 16 U. C. R. 194, and *Balkwell et al. v. Beddome*, 16 U. C. R. 203, shew that this is taken as evidence of an intention to hinder and delay.

J. K. Kerr, Q.C., for the respondent. Any intended preference, in order to avoid the transaction, must have been one contemplated by both mortgagor and mortgagee,

and in the present case the learned Judge who took the evidence has directly found that no such intention existed: *Barron on Bills of Sale*, pp. 86, 87; *Gottwalls v. Mulholland*, 3 E. & A. 94. Now the mortgage being on growing crops did not necessitate a change of possession. In *Branton v. Griffith*, 1 C. P. Div. 349, it was held that a sale of growing crops not being within the Bills of Sales Act in England could not pass as chattels.

Alton v. Harrison, L. R. 4 Chy. 622; *Dalglish v. McCarthy*, 19 Gr. 578; *Smith v. Moffatt*, 28 U. C. R. 486; *King v. Duncan*, 29 Gr. 113, were referred to.

Judgment of the Court was delivered on September 16, 1882, by

WILSON, C. J.—The chattel mortgage is dated 10th December, 1880, and covers among other property a quantity of hay, straw, pease, rye, and the straw of the rye some mixed rye and wheat, and a quantity of oats, and it includes also all the crops and hay which are sown, or grain on the premises therein set out during the year 1881, and the straw thereof, also one yoke of oxen, both dark red colour, four years old each past, and all the mortgagor's household furniture and household stuff, all which said goods and chattels are now lying and being on the premises, situate on the north east half of lot No. 14, in the 2nd concession of said township of Murray, and the north half of lot 14 in said concession.

The hay, pease, rye, mixed rye and wheat, and the oats and straw, I think, need not be noticed, because the evidence shews they had been consumed before the sheriff made the seizure. As to the crops and hay which were sown at the time of the execution of the mortgage, or which might be sown, or grown on the premises herein set out during the year 1881, it is said they are not covered by the mortgage, because the words are "all which said goods and chattels are now lying and being on the premises, situate on the north-east half of lot 14, in the 2nd concession, and the north-half of lot 14 in the said concession,"

and the crops and hay sown at that time and which were afterwards sown were not upon that land, but upon lot 13.

The debtor and mortgagor, James McCormick, had before this given a *land mortgage* to the plaintiffs. The lands are not mentioned in the chattel mortgage, but it was in fact upon the land which he owned, being parts of lots 13 and 14, in the second concession of Murray.

In describing the locality of the hay which was mortgaged, it is said to be under the barn "on the premises mentioned hereinafter," and in describing the locality of the crops, hay, or grain, which were then sown, or which might be sown in 1881, it is said they are "on the premises herein set out," and then follows the clause, "all which said goods and chattels are now lying and being *on the premises*, situate on the north-east half of lot 14, in 2nd concession, and north-half of lot 14, in said concession of Murray."

The *premises* then are confined to the north half of lot 14, both as to the crops and hay sown at the time the mortgage was executed, and which were afterwards sown in 1881.

Those upon lot 13, in my opinion, did not pass, and were not covered by the mortgage. It is very probable there must be some mistake in the mortgage, and that lots 13 and 14 were meant to be described, and not the north-east half of lot 14 and the north-half of lot 14, repeating the same number of lot, while the description of the north half might be sufficient to cover both descriptions.

It is not necessary to say more as to such crops. Growing crops are not lands within the Statute of Frauds, but goods and chattels: *Evans v. Roberts*, 5 B. & C. 829; *Sainsbury v. Matthews*, 4 M. & W. 343. It is true, however, that the mortgage or sale of them need not be registered under the Chattel Mortgage Act, because the possession of them cannot while growing be changed, without changing the possession of the land also upon which they are growing, and that cannot in most cases be done.

There is no doubt, I think, that a sale of crops to be sown upon certain land may be the subject of sale, which will pass the property in them when they are sown.

There can be no difference between dry goods, groceries, lumber, &c., and crops, in that respect, and after-acquired goods will pass by contract, both at law and equity, if they are described so as to be identified when they are acquired: *Holroyd v. Marshall*, 10 H. L. Cas. 191; *Lazarus v. Andrade*, L. R. 5 C. P. Div. 318.

The *bona fides* of this transaction was disputed, but the learned Judge in the Court below found expressly, that so far as the plaintiffs were concerned it was taken in good faith, and not for the purpose of defeating or delaying creditors, and we cannot say that such finding was not fully warranted.

The land was an insufficient security for the debt, and the chattel mortgage was accepted and required by the plaintiffs in order to give them a better and sufficient security—part of which he had lost by the debtor's destruction and removal of timber from the land.

It was argued that if the plaintiff obtained the mortgage by pressure, that was evidence only that the giving of it was not voluntary, and was no evidence that it was free from fraud; but *Ex parte Topham*, L. R. 8 Ch. 614, and *Ex parte Hall, In re Cooper*, 19 Ch. Div. 580, are decisions to the contrary.

There is nothing fraudulent in giving a preference to one creditor over another at common law; such a preference is made void and fraudulent only by statute: *Gladstone v. Padwick*, L. R. 6 Ex. 203, at p. 211.

The appeal will be dismissed as to all the goods and chattels covered by the chattel mortgage, and allowed as to those not included in the chattel mortgage.*

*Under the circumstances the Court directed the respondent to be allowed only half the costs of the appeal.

STEWART ET AL. V. ROUNDS.

Principal and agent—Agency to sell will not authorize agent to exchange goods of his principal — Replevin — Practice — Order xxxvi — Rule 321, J. A. O.

The plaintiffs delivered to one R. some cultivators for the purpose of selling, as their agent, for cash or good notes. Three of these he exchanged with the defendant; who was aware of the fact of agency, for a buggy, which he sold and retained the proceeds. It was shewn that on a previous occasion R. had traded a cultivator with one M. for a horse, which he sold, and gave the plaintiffs a forged note purporting to be that of the purchaser; and on the same day he traded another cultivator with one D., for a watch and \$7, but for this also it was said he returned a note to the plaintiffs. It was not shewn that defendant knew of either transaction, and the plaintiffs had prosecuted R. for the forgery. In an action of replevin the jury gave a verdict in favour of the defendant, but the County Judge in term set it aside, and directed judgment to be entered for the plaintiffs, which on appeal was affirmed, with costs.

Under Rule 321, O. J. A., the Court may, upon motion for judgment or for a new trial, if satisfied that it has before it all the materials necessary for finally determining the question in dispute * * give judgment accordingly: but

Per WILSON, C. J.—Unquestionably that power must be most sparingly and cautiously exercised.

APPEAL from the County Court of Oxford.

Action in replevin for three cultivators.

Pleas. 1st. Did not take the goods. 2nd. Goods not plaintiffs'.

The case was tried before his Honour Judge MacQueen and a jury, at Woodstock, December 14th, 1881.

Two of the plaintiffs were called as witnesses on behalf of the plaintiffs, and stated that they carried on business in the city of London as agricultural implement makers, and that one Frank Randall had been employed by them to sell fanning-mills and cultivators, his instructions being to sell them at a certain price; the cultivators for \$27 cash and \$30 on time, and he was either to return money or good notes; he had not any authority to barter at all: that Randall had returned a note purporting to be signed by the defendant for \$28, which the defendant repudiated, saying that it was a forgery; that they had seen Rounds, the defendant, who stated that he had traded with Randall

for three cultivators, giving in exchange a buggy; and he refused to give up the cultivators when demanded from him.

The jury returned a verdict for the defendant, which the Judge in term set aside, and directed judgment to be entered for the plaintiffs with one shilling damages, referring amongst other cases to *Hamilton et al. v. Johnson*, 5 Q. B. Div. 263.

The defendant thereupon appealed, on the following grounds: That the defendant was entitled to retain his verdict, because the Judge left the case to the jury entirely on the credibility of the testimony of the plaintiffs, and they had found for the defendant, and that was a question peculiarly for a jury to determine; in such circumstances the Court will not set aside the verdict: *Lacey v. Forrester*, 3 Dowl. P. C. 668, *Doe dem. Smith v. Pike*, 1 N. & M. 385, 3 B. & Ad. 738: That the burden of proof was on the plaintiffs; without their evidence they could not recover, the jury disbelieved it, and gave effect to the presumption that the plaintiffs' agent was acting within the scope of his authority when he exchanged the cultivators for the defendant's buggy, contrary to the evidence of the plaintiffs themselves, and the verdict should stand: *Wilkinson v. Payne*, 4 T. R. 468; *Cox v. Kitchen*, 1 B. & P. 338: that the Judge left the matter of the plaintiffs' credibility as the sole question on which the jury should base their verdict, and could not, after the jury had expressly found against the credibility of the plaintiffs, set aside the finding of the jury and enter a verdict for the plaintiffs. The most the Judge could do would be to direct a new trial, and here a new trial ought not to be granted. Even if the Court would have been better satisfied with a verdict the other way, that is not a sufficient ground for setting aside the verdict: *Nolan v. Tipping*, 7 C. P. 524; *Leith v. O'Neill et al.* 19 U. C. R. 233; *Swayne v. Hall*, 3 Wis. 45, *Doe dem. McQueen v. McQueen*, 9 U. C. R. 576; *Brown v. Malpus*, 7 C. P. 185; *Solomon v. Bitton*, 8 Q. B. Div. 176; and that the case of *Hamilton v. Johnson*, 5

Q B. Div. 263, does not apply here, and the rule on which it is based does not apply in this case.

The appeal came on for argument on the 8th of September, 1882.

C. Robinson, Q. C., for the appellant.

McBeth, for the respondent.

The other facts and cases cited appear in the judgment.

September 16, 1882. WILSON, C. J.—It appears to me the finding of the jury was manifestly against evidence. McKay, in April, got a cultivator from Randall in exchange for a horse, and he, McKay, told one of the plaintiffs of it, who answered not to bother about it. Again, Randall traded a cultivator with Dan Macpherson for a watch and \$6 or \$7. One of the plaintiffs says Randall returned a note against Daniel McKay for the cultivator given to Dan Macpherson.

Randall was arrested on the 30th of April, for passing Burke's note, which was a forgery, to the plaintiffs, as a genuine note. Burke bought the horse which was got from McKay. McKay's transaction was before the arrest, but the plaintiffs had only McKay's word for the matter. There was no complaint before the McKay transaction, and that was allowed to stand. The same day Randall traded with McKay for a horse he traded also with Dan Macpherson for the watch and money.

As there was a trade with McKay and Dan Macpherson, the defendant says the trade with him should be allowed to stand. It was only McKay's trade which was allowed to stand by the plaintiffs, because for Macpherson's trade a note was put in by Randall

The defendant also says his trade should stand because on sale of *new reapers* old reapers were taken on account. The plaintiffs say that no exchange was ever allowed to be made upon *fanning-mills*, or cultivators. The defendant, however, contends that there was evidence of authority to exchange generally.

Lindsay, one of the plaintiffs, said he did not discharge Randall after the McKay transaction because he knew of no irregularity till Randall went out with the last load; and he was discharged as soon as he could be got hold of.

I think there is no evidence of power to trade or exchange.

Upon that evidence the Judge might have directed the jury to find a verdict for the plaintiffs; and from the cases referred to under the rule the Judge was authorized to enter the verdict he afterwards did, although unquestionably that power must be most sparingly and cautiously exercised: *Jenkins v. Morris*, 14 Ch. Div. 674; *Hamilton v. Johnson* 5 Q. B. Div. 263; *Dixon v. Simmins*, 48 L. J. C. P. 343, affirmed 41 L. T. 783, 28 W. R. 129; *Jones v. Hough*, 5 Ex. Div. 115.

OSLER, J.—I think the appeal should be dismissed. The evidence is clear that Randall was an agent having a limited authority only to sell the plaintiffs' cultivators for cash or for notes; and that he had no authority to barter. Those were his instructions, and the *onus* rests on the defendant to prove that the agency was of a more general character; and not, as the defendant urges in one of his reasons of appeal, on the plaintiffs to shew that the defendant knew it was restricted. The defendant has, however, attempted to prove that the plaintiffs have so acted as to hold Randall out to the world as a general agent, or as having authority to barter their cultivators.

In *Smith v. McGuire*, 27 L. J. Ex. 465, Pollock, C. B., said, the question to be decided in cases of this sort is, "has the person who is to be charged with liability * * authorized and permitted the person who has professed to act as his agent so to act in such a manner and to such an extent as that from what has occurred publicly, persons dealing with him have a reasonable right to conclude and to draw the inference that the person so acting is a general agent."

The only evidence of this character was of a single

transaction with one Mackay, in which Randall traded a cultivator for a horse, which he afterwards sold, and gave the plaintiffs a note which purported to be the note of the purchaser, but which was in fact a forgery. The plaintiffs had prosecuted Randall for the forgery, but had not repudiated his act. It did not appear that the defendant knew of the transaction when he dealt with Randall, or that the plaintiffs had become aware of it before they received the note which he said he had taken for the horse.

I think the jury could not upon this evidence have reasonably found that there was any holding out of Randall, either to the defendant or to the world in general as having authority to barter or to act in disregard of instructions which were never withdrawn, but were on the contrary insisted on after the Mackay transaction came under the plaintiffs' notice.

In the cases of *Ockley v. Masson*, 6 App. R. 108; *Hazard v. Treadwell*, 1 Str. 506, cited by Mr. Robinson, there had been previous dealings between the agent and the person sought to be made liable, so that there was evidence of an express holding out by the principal, which distinguishes those cases from the one before us.

The only other question is, whether the learned Judge was right in entering a verdict for the plaintiffs. Rule 321, J. A., provides that, upon a motion for judgment or for a new trial, the Court may, if satisfied that it has before it all the materials necessary for finally determining the matters in dispute or any of them, * * give judgment accordingly.

This Rule ought not to be acted on where there is any reason to suppose that on a second trial further evidence may be adduced, or that the facts may be more fully brought out.

There is no suggestion that this is at all probable in the present case. No additional facts remain to be proved, and no jury would be justified in finding a verdict against the plaintiffs, apart from the evidence of the Mackay transaction. I have already expressed an opinion that no

inference can be reasonably drawn from that evidence adverse to the plaintiffs, and therefore I think the learned Judge of the County Court was right in directing judgment under Rule 321. See *Milissich v. Lloyds*, 46 L. T. N. S. 423, C. A.; *Dawn v. Simmins*, 40 L. T. N. S. 556; S. C. 41 *Ib.* 783, C. A.; *Clark v. Molyneux*, 3 Q. B. D. 237, C. A.; *Hamilton v. Johnson*, 5 Q. B. D. 263, C. A.; *Yorkshire Banking Co. v. Beatson*, 5 C. P. D. 109, C. A.

The appeal will be dismissed, with costs.

GALT, J., concurred.

Appeal dismissed, with costs.

REES V. McKEOWN.

Replevin—Boarding-house keeper—Distress—R. S. O. ch. 147.

IN an action of replevin the defendant, for a second plea, avowed for board due by plaintiff to him as a boarding-house keeper; and for a third, avowed for a lien on the goods of plaintiff under R. S. O. ch. 147, sec. 2. On the trial, before the Judge of the County Court (York) without a jury, the evidence as to whether the defendant was the keeper of a boarding-house was contradictory, but the learned Judge decided in favour of the plaintiff, holding that the defendant was not a boarding-house keeper. On appeal this finding of the County Court Judge was affirmed, although, had the matter come before this Court in the first instance, it would have decided otherwise, and under the circumstances, no costs of the appeal were given to the respondent.

APPEAL from the judgment of the County Court of the County of York, discharging an order *nisi* to set aside the verdict entered for the plaintiff, and to enter a verdict for the defendant, or for a new trial.

The action was in replevin for detaining the goods of the plaintiff.

Pleas: (1) Did not detain. (2) Avowry, that plaintiff was boarder in defendant's house, and defendant detained goods for arrears of board due. (3) Avowry of a lien on plaintiff's goods under R. S. O. ch. 147, sec. 2.

Case tried without a jury.

The plaintiff was examined on her own behalf, and swore that the defendant's wife was her cousin, and had come on a visit to her house in Montreal. She had come down to Montreal on business or on a visit to the plaintiff at the hotel as the guest of plaintiff, at plaintiff's expense. When at the hotel she invited plaintiff and wrote for her to visit her house at Toronto, saying plaintiff was to go up and stay with her awhile: she wrote twice to plaintiff, who paid her first visit to Mrs. McKeown in October, 1880. Plaintiff further stated that defendant's husband was employed in the Grand Trunk. She never understood them to keep a boarding-house in her life, although plaintiff knew a gentleman to stop there—to have a rented room. Plaintiff was there for about four

weeks, when she left and went to reside with her brother and his family, and then went to board at a Mrs. Linton's, where she was taken ill and remained for about five weeks. "During that time Mrs. McKeown came down frequently to see how I was. She was very kind to me too. She never in her life said anything to me about paying for my board."

The plaintiff also swore that her brother had paid her board while residing in the house of Mrs. Linton: that defendant and his wife had been married about seventeen or eighteen years, and although she had been frequently at their house she never saw any boarders there, or heard of their keeping boarders.

Roe McKeown, wife of the defendant, was examined for the defence, and swore:

"Mrs. Rees came to my house on the 1st November, 1880, she came to board with me. She was four weeks in the first place, I think, and five the last. It would be a day or so after Christmas that she came back the second time, she stopped with me ten weeks altogether. It was six weeks the second time. She came in without giving any notice, and she said she supposed she could stay here for a time until she could find another place. I never asked her to come to the house. The words she used were: 'I have come, I suppose I can stay until I get another place?' I said, 'Yea.' I spoke to her several times about getting another place. She said, 'No, she would just go when she pleased.' My son and my husband told her so repeatedly. She told me several times she would not pay me anything, other times she said she would give me \$4.00 a week. Other times she wanted to give me her brother for it. I never gave her to understand that she could remain without paying board. I would never keep her in the house if she were not paying board and even with, it would be very hard. She would not leave. I told her she would have to pay her board to me. She understood that thoroughly from the first time she came to the house. Considering her trouble and the room she had from me, I would consider \$7.00 a week very reasonable, for her washing and for her room. She said if she could manage to get \$7.00 from her brother she would pay me with four, and keep three. She did not say anything about what she thought her board was worth. I was waiting on her all the time. She was ill at the time. I have three children and no servant. I have kept boarders off and on for five years. Mrs. Rees has been the last one I had. * * I have systematically kept boarders. I don't class my house as a regular boarding-house, but I kept boarders. My husband and I have been keeping boarders for a number of years. We have eleven rooms. I never went to Montreal, as a visitor to Mrs. Rees. I went on Mrs. Rees's business. Her brother requested me. Her brother paid my

expenses. I never visited with her at all. I stopped at the Windsor hotel a few days with her brother on law business of hers. The convent is where I went to see her. Her brother told me he paid the expenses there."

Patrick McKeown, the defendant, was also examined, and he swore :

"We have been keeping boarders for, I suppose, six years off and on."

By THE COURT.—"Have you been keeping a regular boarding-house for any person that would go there for board? A. No, not every person. Mrs. Rees came there without giving any notice, and about two or three days after I heard Mrs. McKeown tell her distinctly that if she stopped with her she would have to pay her board. At the time she said she would, and when she would get into her tantrums, she said she would not. She is accustomed to them. I heard Mrs. McKeown frequently tell her that. It was an every-day occurrence; a frequent occurrence. In fact it was a trouble to put up with her, and she was asked to go and get some place else. I know she is a cousin to my wife; you would not think so sometimes. We never had more than two boarders. It might be three months before Mrs. Rees came up that we had two. We were not three months without any boarders at all. At the time Mrs. Rees came we had no boarders for it might be a month or six weeks. I don't know why we did not take more than two at a time.

The Judge gave a verdict in favour of the plaintiff and \$2.00 damages.

The defendant thereupon moved for and obtained an order *nisi* to set aside the verdict and to enter a verdict for the defendant or for a new trial.

After hearing the arguments of counsel the County Court Judge discharged the rule *nisi*, with costs. His Honour stating:

"The evidence in regard to the character in which the plaintiff was at defendant's house was very conflicting, but the impression on my mind was that the plaintiff was there as a friendly visitor and not as a paying boarder. However, as I was of opinion that the defendant was not a boarding-house keeper within the Statute R. S. O. ch. 147, and that he had no right to detain the plaintiff's goods, it was not necessary to decide that point. Sec. 2 of ch. 147 R. S. O., enacts that every innkeeper, boarding-house keeper, and lodging-house keeper, shall have a lien on the baggage and property of his guests, boarder or lodger, for the value or price of any board or accommodation furnished to such guest, boarder, or lodger, in addition to all other remedies provided by law. I continue still to adhere to the opinion I formed at the trial; and that defendant was not a boarding-house keeper within the statute, consequently had no right to detain the plaintiff's goods. There is no Ontario case, so far as I know, on the point."

And after referring to *Cady v. McDonnell*, 1 Lansing N.Y. R. 384, the learned Judge proceeded :

* * "Persons frequently board with friends and relatives, and even strangers, who are not supposed or understood to be keepers of boarding-houses ; it is only the keepers of boarding-houses, as such, that come within our Provincial Statute. The present defendant was and is a railway engineer, in no sense a boarding-house keeper. He was a mere private housekeeper, entertaining Mrs. Rees, the plaintiff, who is a cousin of his wife, as a boarder, so that he had no right to detain the goods, and so far as I see no necessity for doing so ; he might have sued for the value of the board in the county or Division Court and realized any damages that might be awarded against her, instead of taking the law in his own hand as he did."

The defendant thereupon appealed to this Court, and the appeal came on for argument on the 8th September, 1882.

Bigelow, for the appellant. Upon the evidence the defendant is a boarding-house keeper within the meaning of ch. 147, sec. 2, R. S. O., and as such entitled to a lien upon the plaintiff's goods, and therefore judgment should have been entered for the defendant. The case of *Cady v. McDonnell*, referred to by the Judge in the Court below, is not law in this Province, being based on a statute giving a status to the keepers of boarding houses similar to that of inn-keepers: *Dansey v. Richardson*, 3 E. & B. 144; *Holder v. Soulby*, 8 C. B. N. S. 254.

Donovan, for the respondent. The Judge before whom the witnesses were examined found in favour of the plaintiff. After having an opportunity to weigh the evidence, and to judge of the credibility of the respective parties he felt bound to rely on the version of the story detailed by the plaintiff in preference to that given by the defendant and his wife. Under all the circumstances this is clearly a case in which this Court should not interfere.

September 16, 1882. WILSON, C. J.—The learned Judge has found that the defendant was not a boarding-house keeper.

I think the evidence shews, however, the plaintiff first

all went to the defendant's house: that she was by arrangement afterwards to pay for her board.

The plaintiff gave an order on her brother for money for board, as McKeown said, and a cheque was sent for it the amount of \$14, and the plaintiff snatched the cheque from the defendant's wife and went to the bank to get the amount of it herself, but the bank refused to pay her.

The learned Judge was of opinion, though he did not decide the point, that the plaintiff was an invited guest and was not to pay for her board. The decision, however, was only on the point that the defendant was not a boarding-house keeper within the meaning of the statute. I should have found differently myself, but there was evidence bearing the other way which the learned Judge relied on.

The appeal must be dismissed, but under the circumstances, without costs.

Appeal dismissed, without costs.

GRANT (*Judgment Creditor*), APPELLANT, AND
VANORMAN (*Judgment Debtor*).

BACON AND KNOWLTON (*Garnishees*), AND
KINNEY (*Claimant*), RESPONDENT,

Insolvent debtor—Preferential assignment—Pressure.

V., who was a practising attorney and also Clerk of the Peace and County Attorney, having been ordered to pay over certain moneys, or in default be struck off the roll of attorneys, made an assignment of his emoluments as County Attorney to H., W., and J. to secure the amount which he had been ordered to pay their client, at the same time telling H., W., and J. that he would leave it to them to hand him back such part as they chose on which to live, such an assignment being generally executed at the beginning of each quarter, upon which they drew the amount coming from the county and handed V. back a portion to live on. Subsequently V. recovered a judgment in favour of a client, on which costs were taxed in his favour at \$164, which he also assigned to secure the same claim. About a month afterwards the plaintiff G., as an execution creditor, obtained an attaching order.

Held, [affirming the judgment of Senkler, Co. J.] that the existence of the order held by H., W., and J. was a sufficient pressure to prevent the assignment executed by V. being considered a preference within the meaning of the Act, (R. S. O. ch. 118.)

THIS was an appeal by the plaintiff, William Grant, from the judgment of His Honour Judge Senkler, sitting at the request of His Honour, the Judge of the County Court of the county of Brant, whereby a garnishee summons obtained by the appellant was discharged, with costs.

The facts appearing in the evidence, which was taken at considerable length, were shortly these: The defendant VanNorman, a practising attorney and County Crown Attorney, had formerly acted as the attorney for the claimant in the present proceedings, and in that capacity had become indebted to him in a sum of about \$1,600, which had not been paid, in consequence of which Kinney applied for and obtained an order upon VanNorman to pay the amount, or in default that he should be struck off the rolls.

Thereupon VanNorman executed an assignment to Messrs. Hardy, Wilkes, and Jones of the amount of his quarterly accounts against the county in trust to apply towards the liquidation of Kinney's claim; and on the 28th November, 1881, he executed a like assignment of a claim which he

d for costs in a suit brought by him against one Bacon
Dallas Knowlton and his wife.

One of the trustees was cross-examined on an affidavit
made by him on the return of the garnishee summons, and
such examination stated that the amount of Kinney's
claim when VanNorman first assigned his salary to him
was about \$1,400.

"Mr. VanNorman had been for some time each quarter assigning his
quarterly salary to Mr. Kinney. The first of these assignments was first
made about two years ago. This assignment was made on account of Mr.
Kinney having made an application at Toronto to have Mr. VanNorman
struck off the rolls for non-payment of this debt. Under these assign-
ments Mr. Campbell, the county treasurer, has from time to time issued
cheques in favour of our firm, and we have received the moneys. We
have only applied portions of the payments to Mr. Kinney's debt. I
think at first Mr. VanNorman paid us \$250 in cash, and after that \$150,
making \$400, and since then about \$100 a quarter has been retained by us,
and balance paid to Mr. VanNorman. There was no agreement or
understanding that we should only retain \$100 a quarter, but I thought
it was as much as I should keep out of the amount. Mr. Kinney
became aware of this. Mr. VanNorman usually drew the assignment
himself. The rule to strike him off was enlarged from term to term
formerly, and latterly was enlarged for a longer time, and is still pending.
The surplus over the \$100 was given back simply by me without reference
to whether it was a loan or not. Kinney had no personal knowledge of
the assignment, but I informed him and he has given an order for the
money on Bacon. Mr. VanNorman made the assignment and brought it to
me without any request by me. I think he had it executed, but he
handed it to me and I witnessed it. I had no conversation with him
before, that I recollect. There may be about \$800 still due Kinney,
though I have not made up the amount. I think Mr. VanNorman had
previously assigned to me a bill of costs of \$50 or \$60 on Kinney's claim.
I think I did not receive it. I do not remember any others. There was
no understanding when the present claim of Bacon's was assigned that I
was to pay it back to Mr. VanNorman. There never was any agreement
or arrangement by which I was to pay Mr. VanNorman any part of this
money back. I never paid Mr. VanNorman, on behalf of Kinney, any-
thing on his making this assignment or by way of loan."

Mr. VanNorman was also examined by the appellant,
and swore:—

"I am unable to pay my debts as they mature. Have been in financial
difficulties the last two years. Several judgments are standing against
me, and have been for a couple of years past. My personal property has
been sold under execution. Moneys payable to me through the county

treasurer were garnished about two years ago. I cannot say how far other people are aware of my difficulties. Elliott is father-in-law to my son. I have generally at the beginning of each quarter made an assignment to Hardy, Wilkes, and Jones, of moneys coming to me for that quarter. It would be an assignment of my future earnings during that quarter. I cannot say what these all amounted to. The assignments were to Hardy, Wilkes, and Jones, in trust for Kinney, whom I owed. The moneys I owed to Kinney he contended I had no right to use. I contended he had lent them to me. The Court decided I must pay him or lose my position. I told Hardy & Co. I would assign my whole income to them, leaving it to them to hand me back any part to live on they chose. They have drawn all these moneys and have handed me a portion. Whenever they gave me anything I gave them a new assignment. If I did not give an assignment immediately on getting any money from them I did it very shortly after. There was a *quasi* understanding that I should do this. I would not say that on any occasion an assignment was given contemporaneously with my getting the money. I cannot give the date of the last assignment, nor can I say whether any money was paid to me at that time. I think I drew all the assignments to Mr. Wilkes, myself.

"I resisted the motion to strike me off the roll. I was perhaps late in doing this. I appealed against Mr. Dalton's decision, but failed. I had not the slightest intention of defrauding my creditors. I have been practising since 1839, have done no business since then except in my profession."

On the 25th of December, 1881, VanNorman made another assignment (subject to that in favour of Kinney) to John Elliott of his claims against the county, on the occasion of Elliott indorsing an accommodation note for VanNorman, and which he discounted at the bank and received the proceeds of. VanNorman further stated that—

"No assignment was made to Mr. Wilkes prior to the first garnishee order. My object was to secure the Kinney claim without regard to others. I never thought of them. It was absolutely necessary to get rid of the Kinney claim. Mr. Elliott indorsed a note for me for \$350, and it was discounted and the assignment was made to Elliott to secure him. The bank manager had agreed to discount my note indorsed by Elliott. I should suppose Elliott knows I am embarrassed. The order to strike me off the rolls has been enlarged from time to time, and has been carefully kept alive. I suppose it will be enforced if I do not pay the claim. * * Dr. Bacon does not owe me anything, and never did."

The appeal came on to be argued on the 11th September, 1882.

Moss, Q. C., for the appellant. The evidence shews and the Judge below has found that the assignments, the validity of which is impeached, were given by the debtor without any solicitation on the part of the creditor; the doctrine of pressure therefore is inapplicable, as the idea of giving the security originated in the mind of the debtor himself. The proper inference to be drawn from what occurred was and is that the assignments were preferential, and therefore void as against the appellant. The amounts received under the assignments of his salary made from time to time by the judgment debtor more than paid the claimant's demand, and the sums returned to the debtor from time to time created a new indebtedness in respect of which the order of Court, the existence of which the learned Judge found was sufficient to validate the assignment, could not be enforced. The mere existence of a power of exerting pressure without its actual exercise will not validate a security otherwise preferential and void. The proper inference to be deduced from the evidence is, that the several assignments from time to time of the judgment debtor's salary to the claimant's trustees were voluntary, and made for the purpose of defeating and delaying his other creditors, or some or one of them.

S. H. Blake, Q. C., for the respondent. It is difficult to imagine a more stringent degree of pressure than that brought to bear upon the debtor in this case. The mere fact of the trustee having handed over to the debtor a portion of the amount received under each assignment so as to enable him to support himself and family has never been deemed any evidence of collusion or want of good faith. The following authorities were referred to: 13 Eliz. ch. 5; R. S. O. ch. 118; *Smith v. Pilgrim*, 2 Ch. D. 127; *Ex parte Tempest*, L. R. 16 Ch. 70; *Exp. Topham*, L. R. 8 Ch. 614.

September 16, 1882. The judgment of the Court was delivered by

GALT, J.—On the argument of this appeal, the only question raised by the appellant was, as to the assignment of the costs in the suit of *Knowlton v. Bacon*, made by Van-Norman, who is insolvent, to Kinney, being voluntary and a fraud upon Grant. In our opinion the learned Judge before whom the case was heard, was entirely right in holding the assignment to have been *bond fide*, and made for the purpose of securing the party to whose agent it was given and not to prejudice his other creditors, and was made under pressure. We cannot imagine a stronger case of pressure than that under which VanNorman acted. An order had been made on him as an attorney to pay Kinney's claim, and was renewed from time to time, and might at any moment have been issued on the application of Kinney; and from the evidence it is plain that Van-Norman was making every effort in his power to discharge the debt.

This appeal will be dismissed, with costs.

NOTE.—The foregoing County Court Appeals were heard under the Order of the Supreme Court of Judicature, printed *ante* p. 454.

MACDONALD V. WORTHINGTON ET AL.

Partnership articles, construction of—Ownership of stock—Law of Quebec—Reformation of articles—Practice—Reference back to Court to take evidence after refusal to call witnesses.

The plaintiff and defendants M., having on hand large contracts to fulfil, entered into partnership with the defendant W., under the style of J. W. & Co. The articles of agreement which were drawn in the Province of Quebec, declared that the plant, which the plaintiff contributed to the partnership, should become the property of the said firm, that is to say, "the one half thereof shall revert to and belong to the plaintiff and defendants M., and the other half to W." The law of Quebec was proved to be that if nothing were provided by the articles as to the ownership of the plant, it would be taken out of the partnership at the conclusion of the same by the party who had contributed it, before division of profits. The plaintiff and the defendants M. all swore that the intention was, that they should receive credit for the plant as their property in the accounts of the partnership. It was shewn also that in the treaty for the partnership inventories of the plant were drawn and its value was discussed, the plaintiff putting it at \$57,130, W. consenting to it being placed at \$40,000. The notary who drew the articles swore that if it had been intended to make a transfer of the property in the plant, he would have expressed such intent more explicitly. The book-keeper swore that the plaintiff had claimed credit in the books for the plant from the first, and that in discussing the matter with W. a reason had been suggested for not immediately giving such credit that the plant was under mortgage.

Held, that upon the true construction of the articles of partnership as drawn, the plant was withdrawn from the operation of the law of Quebec as proved, its ownership being expressly provided for by the instrument; but that the evidence given by the parties other than W. was clear and satisfactory, that a mistake had been made in drawing the same, and that the articles should have been reformed so as to entitle the plaintiff to credit for the plant in taking the accounts; and on this ground the judgment of the Court below was reversed.

At the trial counsel for the defendant objected that there was no sufficient case made out upon one branch of the plaintiff's claim, the rectification of an agreement. The defendants' counsel thereupon declined to argue the point until the evidence was closed, and the defendants then called one witness upon another point; as to the rectification, the learned Judge ruled that the plaintiff had made out no case—and as to the other points he decided in defendants' favour, and dismissed the bill, with costs.

Thereupon the plaintiff appealed to this Court and the decree was reversed and the relief prayed for given to the plaintiff.

On settling the certificate of judgment the solicitor for the defendants objected to that part of it which directed the taking of the accounts between the parties, and that credit should be given for \$40,000, the value of the plant, &c., seeking to have the action remitted to the Court below, in order to conclude the trial, and take such evidence as the respondent might adduce in support of his defence, and moved the Court to vary the certificate accordingly.

Held, that the defendant was bound by the course which he had elected to adopt, and the application was refused, with costs.

THIS was an appeal by the plaintiff from a decree of the Court of Chancery pronounced by Proudfoot, V. C., in a cause wherein Angus Peter Macdonald was plaintiff, and James Worthington and the plaintiff's sons, Wallace Edwin Macdonald and Randolph Macdonald, were defendants, the bill in which set forth that the plaintiff was a contractor, and had been largely engaged in the construction of public works in the Dominion of Canada, and that he with his said sons had been in the early part of the year 1875 engaged in carrying on contracts entered into by them with the Department of Public Works of the Dominion, for the construction of certain public works on the Lachine Canal. That for the purpose of carrying on these works the plaintiff and his said sons were possessed of a large quantity of plant, horses, tools, and implements requisite for carrying on such works, and also were the owners of certain quarries from which stone was obtained for the said work, and also of a number of steam tugs and scows which were used in the fulfilling of the said contract, which property was of the value of \$40,000 and upwards, and which was incumbered by a bill of sale by way of mortgage, made by the plaintiff and his said sons to certain parties under the name of "Morland, Watson & Co.," for the purpose of securing the repayment of certain advances made by that firm to the plaintiff and his said sons, to aid them in carrying on such work, amounting to about \$24,000.

The bill further stated that in or about the month of January, 1875, negotiations were entered into between the defendant Worthington and the plaintiff with a view to Worthington taking an interest in the contracts then held and being carried on by the plaintiff and his sons, and such negotiations resulted in an agreement that a partnership should be formed between the plaintiff and defendants under the name of "James Worthington & Co.," for the completion of such contracts, and that the interests of the parties in the said co-partnership should be as follows: that is to say, the plaintiff and his said sons were to receive

credit for the sum of \$40,000, being the value of said plant, &c., as determined by the defendant Worthington, the plaintiff, and his said sons, and that after the payment of the amount of indebtedness on said plant, &c., together with interest thereon, and of all advances to be made by Worthington to the co-partnership out of the business and profits, then the balance of the profits as well as the said plant, &c., were to be divided as follows : that is to say, to the plaintiff and his said sons, one-half, and to Worthington, one-half ; and it was further agreed that Worthington should pay off the indebtedness to Morland, Watson & Co., under the said mortgage upon the said plant, &c., and that he should obtain an assignment thereof to himself and hold the same, and all further plant and tools purchased by the firm, until such time as the said sums so paid by him and interest, and also the amount of any advances he might make on account of the said partnership, should be reimbursed to him out of the business and profits of the said partnership of James Worthington & Co., when after allowing the plaintiff and his said sons credit for the sum of \$40,000, the same should be dealt with and treated as assets of the firm free from such incumbrances; and that Worthington, in pursuance of the said negotiations, obtained an assignment or transfer of the bill of sale by way of mortgage from Morland, Watson & Co.

The bill further stated that an agreement in writing was entered into between the plaintiff and the defendants on the 29th of March, 1875, before P. E. Normandeau, notary public for the Province of Quebec, the fourth article of which provided that,

“ The stock of the said partnership consists of the whole of the plant, tools, horses and appliances now used for the construction of said works, by the said party of the first party ; also all quarries, steam tugs, scows ; and also all the rights in said quarries that are held by the said party of the first part, or any of them, the whole of which is valued at the sum of forty thousand dollars, and is contained in an inventory thereof hereunto annexed for reference after having been signed for identification by the said parties and notary ; but whereas the said plant, tools, horses

and appliances, steam tugs, scows, quarries, and other items had been heretofore sold by the said party of the first part to the firm of Morland & Watson, of the city of Montreal, hardware merchants, to secure them certain claims which they had against the said A. P. Macdonald & Co., for moneys used in the construction of the works referred to, to the extent and sum of about twenty-four thousand dollars and interest; and whereas the said James Worthington has paid the said amount of twenty-four thousand dollars and redeemed said plant, tools, horses, and appliances, and quarries, steam tugs and scows, &c., and now stands proprietor of the same under a deed of conveyance; it is hereby well agreed and understood that the said plant, tools, horses, and appliances that are or may be put on the said work shall be and continue to be the entire property of the said James Worthington until such time as he shall have realized and received out of the business and profits of the present partnership a sum sufficient to reimburse him of the said sum of twenty-four thousand dollars and interest so advanced by him as aforesaid, as also any other sum or advances and interests which shall or may be paid or advanced to the present firm or partnership, after which time and event the whole of the stock shall become the property of the said firm of "James Worthington & Co.," that is to say: the one-half thereof shall revert to and belong to the party of the first part, and the other half to the said party of the second part, as the said James Worthington has a full half-interest in this contract and all its profits, losses, and liabilities, and the said A. P. Macdonald, W. E. Macdonald, and Randolph Macdonald, parties of the first part, jointly and severally, the other half-interest in the same." * *

Which said agreement was duly executed by all the parties thereto and the said notary.

The bill further stated that in pursuance of such agreement the works were completed, and the purposes for which such copartnership had been formed having been accomplished the affairs thereof were in process of being wound up and adjusted, when, for the first time, Worthington, although admitting that he had been paid the amount so advanced by him to Morland, Watson & Co., and all other advances made by him to the copartnership, claimed to be entitled to one-half the proceeds of the said property, which was originally the property of the plaintiff and his said sons, without first giving them credit for the sum of \$40,000. And the plaintiff submitted that the true agreement entered into between the plaintiff and the defendants when the negotiations for a partnership were being made, was, as Worthington well knew, that the plaintiff and his

said sons should receive credit for the sum of \$40,000, and that the said property should after the repayment to him of the moneys so advanced by him, form a part of the assets of said copartnership, free from such incumbrance; but it was never contemplated or intended that Worthington should have one-half interest in the said property over and above the amount advanced by him to Morland, Watson & Co., and the said copartnership, without first giving the plaintiff and his said sons credit for \$40,000.

The prayer of the bill was, amongst other things, that the true intent and meaning of the said agreement might be declared, and that, if necessary, the same might be reformed and rectified so as to conform to the true intention of the parties; the rights and interests of the parties in the partnership assets declared and settled, and the affairs of the partnership wound up and adjusted under the direction of the Court: that a receiver might be appointed; and for an injunction restraining Worthington and his workmen or agents from drawing, receiving, disposing of or in any way interfering with certain moneys due to the partnership by the Department of Public Works, or any other person, or with the said plant or materials.

The defendant Worthington answered the bill, insisting on his right to a one-half share of the plant, &c., without giving credit to the plaintiff and his sons for the sum of \$40,000.

The defendants Macdonald also answered the bill, insisting on the same construction of the articles of partnership as that set up by the bill.

The cause having been put at issue came on to be heard before Vice-Chancellor Proudfoot on the 22nd, 23rd and 25th days of April, 1881, when the plaintiff and the defendants Macdonald were examined as witnesses, the effect of which was to shew that the net profits of the partnership had been about \$65,000 or \$70,000, and that the intention and understanding of all parties, when entering into the copartnership, was that the Macdonalds should receive credit in the books of the partnership for

\$40,000, the sum at which it was agreed the plant, &c., should be valued.

One James McCracken had been examined *de bene esse*, on the eve of his departure from this country, and the depositions then taken were allowed to be read.

McCracken had been employed as the book-keeper of the parties during the execution of the works by them, and in the course of his evidence in answer to a question whether he knew the terms of the partnership apart from having read the agreement, swore :

"From hearing the matter discussed between the parties concerned I would have had a certain knowledge apart from the reading of it I suppose. I have heard discussed matters of capital and plant, relative credit on the books and the prospect of profits or losses, and other things that came up from time to time. The matters that I heard discussed were subsequent to the formation of the partnership. I don't know that I heard the matter discussed at length before the partnership. What I refer to in this answer is mostly after the partnership was formed. I can't say that I recollect any conversation in particular affecting the partnership between the parties previous to the formation of the partnership.

* * At first things went on very smoothly but afterwards some little differences arose, and it might have been two years in progress when a little difficulty arose in the office in regard to a cheque that Mr. Macdonald asked Mr. Worthington for. I think it was a monthly allowance cheque, but I am not sure. Mr. Worthington demurred to giving a cheque, referring to the state of the bank account, and saying he was personally responsible, and intimated something about a possibility of a loss on the whole thing, and if a loss were incurred he would be held responsible, as his name was there as indorser, and he demurred to giving the cheque. Mr. Macdonald argued with him and intimated that he wouldn't be the only loser, that if there should be a loss he, Mr. Macdonald, would lose nearly as much, inasmuch as his plant was in the concern, and if there was a loss he would lose his plant? Mr. Worthington made some evasive reply, and didn't give the cheque that day, but to the best of my recollection a day or two afterwards the cheque was given.

"Q. Was the amount of plant mentioned? A. I think so; there was another discussion between them. I remember two conversations of this kind, and I don't know whether it was on that particular day or the other, but I remember Mr. Macdonald on one of the occasions mentioning his \$40,000 worth of plant. Mr. Worthington didn't say yes or no to that statement. He didn't acknowledge that Mr. Macdonald had \$40,000 worth of plant; nor did he, when Mr. Macdonald made his statement, say, 'you shan't have credit for it.'

"Q. Have you any recollection of Mr. Worthington saying that it would be time enough to talk about that when we have anything to divide? A. Yes. I remember that distinctly. That was a part of his remarks. He kind of smiled and said, 'it would be time enough to talk about that when there would be anything to divide.' They commenced the conversation in a friendly enough spirit, but on Mr. Worthington demurring to give the cheque they both got warm, and then branching out into matters of plant and other things connected with the thing, they both got a little warm and Mr. Macdonald, in that way, remarked, as I have said, that if there was a loss sustained he would lose to the extent of his plant, and Mr. Worthington remarked that it was time enough to talk of these matters when there would be anything to divide; but when Mr. Macdonald spoke of the plant there was no refusal to admit his right to the credit.

"Q. From their conversation do you think the matter had been talked of between them before? A. I would have inferred as much. It didn't appear to be a new subject between either of them. At the moment I do not recollect of any conversation other than the two I have mentioned between the plaintiff or his sons and the defendant Worthington about the \$40,000. I have had a conversation with Mr. Worthington about the claim of \$40,000 credit since the commencement of this suit. On one and perhaps two occasions, he said they might be entitled, or he would allow them \$16,000.

"Q. Do you remember did he put it in the alternative? A. He said that in any case, or in the matter of a settlement, all they could claim would be \$16,000.

"Q. Did he express himself inclined to pay that—to allow that? A. Yes. He intimated that for the sake of a settlement he would be disposed to allow that.

"Q. Mr. Worthington had considerable money to the credit of his capital account from time to time?" A. Yes.

"Q. Explain how the interest on that account was kept? A. At the end of the first six months interest was computed on the amounts of the capital account. A kind of average was struck, and the interest calculated on the several amounts and the total interest and the total capital for the first six months were added; then the following six months it was computed on the amount of his capital for the six months again, and so on all the way through.

"Q. Then every six months he received compound interest? A. That would be interest on interest, I suppose.

"Q. Mr. Worthington put considerable plant and materials on the work? Yes; he contributed some plant that came from the Inter-colonial work. This would be entered to his credit as cash. It helped to make up his capital account.

"Q. He received interest on this as well as on the cash advanced in the same way? A. Yes. I don't think there was any difference made. There might have been the first six months, but subsequent to that it was always calculated the same way.

"Q. The plaintiff and his sons had a considerable amount to their credit when the partnership was first formed? A. Some \$12,000 or \$13,000 each. They received no interest on that.

"Q. They didn't receive interest on their capital or what they claimed as their capital, any portion of the \$40,000? A. No, none. I have the ledger here of James Worthington & Co. I produce Mr. Worthington's account and under date 16th May, 1879, turning to his capital account I see it would be overdrawn about \$2,114.82.

"Q. Were you not put to considerable inconvenience by his inattention to his part of the business? A. We had some little trouble at times. I had to draw on him once or twice, and write for cheques, and that sort of thing, when he was absent from the city. Mr. Worthington has been credited with salary up to the 1st December, 1879. I made the entry under his instructions. Mr. Randolph Macdonald and he were together. I was crediting the former with his time, and afterwards Mr. Worthington told me to give him his credit.

"Q. Which of the partners took the general management of the office? A. Mr. Worthington was the financial and office manager. It was to him that I generally looked for instructions in office operations and financial matters. * *

"Q. Has Mr. A. P. Macdonald or either of his sons, ever asked you to credit them with the \$40,000 in question in this cause? A. Yes, they have. Both Mr. A. P. Macdonald and Mr. Randolph. Mr. Wallace Macdonald hasn't been here since this question arose.

"Q. What answer did you give to these requests? A. I didn't feel that I would be free to do so without the consent of all the parties concerned, and I remarked that Mr. Worthington was the usual office manager, or I managed mostly under him, and I had no instructions, and it being a large item I hesitated to do so without the consent of all the parties. * * I don't think I was present at any of the negotiations [in reference to the formation of the partnership]. I may have been but I have no distinct recollection. I remember his [Worthington's] coming there from time to time to the office and discussing the thing off and on. I see it did make out an estimate of the plant held by the Macdonalds at that time. The inventory 'A' is in my handwriting. * *

"Q. Do you recollect shewing that estimate to Mr. Worthington after it was made out? A. I have no distinct recollection, but I know the value of the plant was discussed. I know it from this, because Mr. Worthington objected to the valuations, and he must have seen the estimate. It was considered high by him. He objected to the valuations because he thought it was over-estimated, and Mr. Macdonald agreed to reduce the plant to \$40,000 to meet his views. I was present when that was done—that is reducing this \$57,000 to \$40,000.

"Q. All that Mr. Worthington would agree to was ———? A. \$40,000. I don't remember whether the proposition came from him to make it \$40,000 or from Mr. Macdonald, but it was agreed between them that it should be \$40,000. As far as I know they were satisfied with the \$40,000. * *

"Q. Did you hear them state what was to be done with this valuation of \$40,000? A. No. Not at this time. I was aware that this plant was mortgaged at the time. I knew Mr. Worthington was to assume the payment of the mortgage; but the particulars of the conversations had between them I don't recollect. I didn't suppose then it would come to this. Mr. Worthington came into the partnership a short time afterwards. Actively engaged in it as the financial partner. I took my instructions more particularly from him than any one else. He did pay off the mortgage on the plant. A portion of cash was paid down. I couldn't distinctly say how much; I only know from hearsay.

"Q. Do you know how any part of it was paid? A. Yes. Mr. Worthington got some moneys from time to time from the firm, and notes were given in the meantime to Morland & Watson by Mr. Worthington in his own name for a part of the liability, which notes were taken up by Mr. Worthington by moneys part of which he drew from the partnership. I don't know to what extent particularly. I remember going there with cheques once or twice, and taking up some notes, and on one occasion renewing a note for Mr. Worthington. I think the bank-book will shew that cheques were given by Mr. Worthington on several occasions—firm cheques that were charged directly to Mr. Worthington in our books, and went to pay his personal liability to Morland & Watson. Mr. Worthington drew his money from his capital account in the ledger. He had a capital account at that time. I opened that at his request. Each one of the firm had a capital account. * *

"Q. Besides those cheques that he got from Worthington & Co., he got his monthly account regularly? A. Yes. He drew his cheques when he wanted to.

"Q. Why did you not credit A. P. Macdonald with the value of the plant at that time? A. Because it was under a lien or mortgage and Mr. Worthington assumed the control of all the plant until he was repaid the \$24,000 so advanced. I know that because it is set out in the partnership deed. I didn't see the deed though for some time afterwards."

"Q. Was there any statement of account made out between the parties at all? A. A statement of their capital accounts was usually made out every six months. Once a year the books were balanced and a statement of accounts shewn.

"Q. At any of these times when a statement was made out was there any conversation about the plant or this credit of \$40,000? A. Not that I recollect or heard. The partners seemed to have confidence in each other during the partnership. Sometimes a little breeze would arise."

"Q. Then there was no entry of the \$40,000 made in the books? A. No, not at that time. A portion of it was afterwards made in the suspense account. That was made by the auditor. I made no entry of it at all in the other books."

Having been asked on cross-examination when the Macdonalds claimed to be entitled to credit for the \$40,000, the witness answered:

"A. I understand from them from the beginning, but I never discussed the thing with Mr. Worthington at that time.

"Q. You never discussed with Mr. Worthington any reasons for not crediting the plant to Macdonald & Co? A. Yes; I think so. The fact that it was under mortgage was the reason assigned. When these books were opened to the best of my recollection that matter was spoken of, and to the best of my recollection that was the reason assigned for not entering the credit or not making a note of the plant in some way.

"Q. But the question whether they would get credit for it or not ultimately by him was not discussed? A. No; I think not.

"Q. Then when you say the reason for their not getting credit was that there was a lien on it—that is the reason you assign in your own mind? A. Yes."

Mr. Normandeau, the notary who prepared the articles of partnership, was also called as a witness by the plaintiff, and he swore that the instructions for the preparation of that document were principally given to him in writing—and that he reduced them to the notarial form; he was now aware of the point of difference between the parties:

"A. As to this \$40,000, my instructions were these, that this \$40,000 worth of plant was the contribution by Macdonald & Co., the party to the deed, towards the capital of the partnership; there was nothing told to me at the time that they should not be credited with it, to the effect that they should not be credited with the amount that they put in.

"Q. What did you understand the law to be A. The way I understood the law to be was the way I wrote it, that it should be there for the benefit of the partnership during its existence; they contributed this plant, and the other party, Mr. Worthington, contributed capital to redeem it, and he was to get interest for his capital; that was the interest he was to get.

"Q. And you understood that that would be by law for the benefit of the partnership? A. By law if we do not exclude the plant—stock put in by one partner into a concern continues to be his property the moment you do not exclude it and give it to the other in express words.

"Q. Well, if that partnership terminates, what becomes of the property, assuming the property to be property in specie which is put into the concern for the term; at the dissolution of the partnership what would become of the property that has been put in by one of the members of the firm, it not being excluded? A. What I mean by being excluded, that is the property would not move out of the real possession of the real proprietors of it—that the Macdonalds put the plant, boats, quarries, etc., in for the use of the partnership, but it was their property; this property was to be redeemed by Mr. Worthington who was to advance the money itself, that it was to return to the partnership for the benefit of the partnership during its existence, and at its winding up it would naturally return to the party who brought it in unless excluded by express terms.

"Q. Then you drew this agreement, or did you draw these articles to carry out, or assuming that they would carry out in that way what you have explained to be your view of the law? A. Certainly.

"Q. And if the proper construction of the articles is that they do not mean that, then what do you say? A. Well, if they do not mean that, if I intended to make a transfer of the property, of that stock, of the ownership of that stock, from one party to the other, I would have expressed it in much more explicit terms. I would declare that he would hold it at the end of the partnership, and so forth, as we always do.

"Q. Are you skilled in the law of the Province of Quebec? A. Yes. . . .

"PROUDFOOT, V. C.—You think that the law of the province is as you have stated? A. In regard to partnership it is the common law of the province.

"Q. That is, that the contribution of each party to the capital stock remains his property, that it is only for the use of the firm during its continuance, and reverts to him afterwards unless specially excluded? A. Yes; I find it under the article of the code in which at the dissolution of a firm a division of the property is made under the partnership or commercial laws, or as we divide succession to an estate, and in an estate each son takes his own before dividing the profit."

At the conclusion of the plaintiff's evidence counsel for the defendant Worthington submitted that so far as the case was based upon a right to a rectification of the instrument on the score of mutual mistake it wholly failed, and the defendant ought not to be called upon to answer that portion of the plaintiff's case. Counsel contended that the evidence of the parties—the terms of the paper itself—and the evidence of Mr. Normandeau—did not indicate that a case had been made out which would render it safe for the Court to alter any of the clauses or insert any other provisions in it.

"PROUDFOOT, V. C.—I will hear Mr. McCarthy, but my impression is, as you have stated, that there is not a sufficient case made out.

"McCarthy, Q. C.—If my learned friend elects not to call witnesses, of course if the evidence is closed—

"PROUDFOOT, V. C.—My impression is, that there is not a sufficient case made out upon the evidence to shew that there was any mistake, or that the parties were under a misapprehension in the matter, but if Mr. McCarthy desires to go over the evidence I shall be happy to hear it; if not, I will state that that is my opinion arrived at during the progress of the case, and I may say further that I hardly think it necessary to reform the instrument; all the parties seem satisfied with it; Macdonald and

his two sons seem to be satisfied that it expresses their intention, and Mr. Worthington relies upon it.

"*McCarthy*, Q. C.—If your Lordship will note this, that it is not desirable to argue the case in the presence of witnesses; and also note that my contention is that if they do not call witnesses they do it at their own risk. My learned friend can take that course if he pleases or not; if the evidence is all in I am prepared to argue the case, but I know of no rule of practice requiring me to argue it till the evidence is closed.

"*Proudford*, V. C.—The practice I have been in the habit of pursuing ever since I have been appointed to this position is, that the defendant may ask if the plaintiff has made out a case, and the plaintiff may shew that he has made out one and require the defendant to give evidence, but if he does not do that, then the defendant may ask for the bill to be dismissed.

"*McCarthy*, Q. C.—I understand that what I have expressed is the rule, that the examination must be closed.

"*Proudford*, V. C.—I understand you to say that you decline proceeding with the argument till the evidence is closed?

"*McCarthy*, Q. C.—Yes, my Lord.

"*Proudford*, V. C.—Then I do not think that I should call upon the defendant, that is upon this point; it leaves still the other question for discussion.

"*Blake*, Q. C.—That is simply the question, whether there is a case for rectifying this paper. I do not know whether my learned friend intends to argue that the evidence Mr. Normandeau has given as to construction, is evidence sufficient to alter the instrument according to our principles of interpretation.

"*McCarthy*, Q. C.—We propose to argue it upon Mr. Normandeau's evidence.

Thereupon the defendant Worthington called Thomas W. Ritchie, Q. C., an advocate residing in Montreal, who referred to the several articles of the code bearing upon the point as to the proper construction of the clause in question in the articles of partnership, stating that the articles 1830 to 1900, inclusive, were those relating thereto, and that those were the articles which did in fact refer or were applicable to the law, irrespective of Mr. Normandeau's statement.

"Q. You are familiar of course with the English law as to partnership? A. Well, more or less. Q. It enters into your commercial law? A. Yes, more or less. Q. Is there any difference between the English and French law as to partnership generally? A. I would not like to answer that question. Q. Are you not governed by English commercial law as to partnership? A. No, we are governed by our own code. Q. Would you not read Lindley as an authority? A. No, not as an authority; we would cite English and Ontario cases, not as authority against our own code, or against our own decisions, but of course having very great weight in some cases. Q. The code is your authority? A. The code contains our whole law; I think it was laid down in a case in the Privy Council of *Frazer v. Abbott*, that where the rules laid down in the code are clear they govern.

At the conclusion of the argument.

"**PROUDFOOT, V. C.**—I have had a great deal of uncertainty and hesitation in deciding what the proper decree should be in this case, but on the whole I think it better not to defer expressing the conclusion at which I have arrived.

"In regard to the rectification of the instrument I have already expressed my opinion that I do not think the plaintiff has made out a case for that purpose. There is no doubt that an agreement of this kind can be reformed by parol evidence if it does not comply with the intention of the parties in its reading or specifications or something of that kind, but where either party denies the accuracy of the allegations it is almost impossible to get evidence sufficiently strong to overcome it. The question here is, whether the evidence given is of that strong, irrefragable character that credit must be given to it in the face of the denial of the defendant. I cannot say that it is. The only person who seems to have placed the agreement on a different footing from the defendant is the plaintiff Macdonald himself. The sons do not speak with any great certainty of their own knowledge or recollection? It rests entirely on the evidence of Macdonald himself. He does say that he was to get credit for this plant and that it was to be carried to his credit in the books of the concern and become his part of the stock of the concern.

"That is expressly denied by the defendant, and in that position of affairs I think it impossible for me to act upon the evidence that has been given. Besides, the whole of the circumstances connected with the execution of the document seem to preclude the propriety of the Court now taking upon itself, upon evidence of that character, to interfere with the deliberate dealings of the parties. This contract had been the subject of negotiations for a considerable time, at all events for a week or a fortnight, before it was finally concluded, and the terms of it had been discussed between the parties. Macdonald and Worthington had all these matters before them. Worthington had delayed completing the agreement till he had an opportunity of inspecting the materials. After this was done he did prepare heads of the agreement that was to be entered into between them. These were submitted to Macdonald, he saw them, he approved of them. They carried this to a notary for the purpose of putting into legal shape the agreement they had entered into.

"Again the matter is discussed before the notary; his opinion is asked, these matters are all discussed between the parties themselves—the draft of the agreement is read over clause by clause, and finally the agreement when engrossed is read over and all parties assent to it. I think it is impossible in the face of such an agreement as that for the Court to venture to interfere.

The other question then is as to what is the nature of the agreement itself, and whether the plaintiff and his sons are entitled to credit in the books of the concern for the \$40,000. I confess I have had a great deal of doubt and hesitation about this feature during the progress of the case, but on the whole I do not think the true construction of the

agreement is that the plaintiff is to receive credit for this in the books of the concern. He has failed to establish, I think, that there is an omission of any term of the agreement between himself and the defendant, and there being no omission of any term it rests entirely upon what the agreement itself says. Now the fourth clause of the agreement expressly provides for the purchase back from Morland, Watson & Co. of this stock, of this plant, by Worthington for the \$24,000, and that then after that had been purchased back and Worthington had been paid this money out of the assets of the firm, it was to go in as stock of the firm.

"If that be not the agreement, then Worthington was to pay in something over \$8,000 for getting admitted into the concern—

[*"Mr. Blake—12,000, my Lord; he would have to pay \$24,000—that was to be paid out of the firm, and \$12,000 would go to Worthington's share."*]

"Yes; I suppose it would really be paying \$12,000 for getting into the firm. Well, what was the condition of the firm at that time? Macdonald had a contract with the government for the execution of these works—they had made considerable progress in them; they had spent, as Macdonald tells us, something like \$190,000 in preliminary preparations, particularly in the way of procuring and opening quarries, constructing tramway, dock and trestle work, and various other matters preparatory to carrying on the work. It would have been a very serious matter for the Macdonalds to lose this, and we are told by themselves that they had no means for carrying on the work at that time, unless through their chances of getting some partner to go in with them. We find they were negotiating with various parties, with parties in New York, for that purpose, and they do not tell us why these negotiations broke off further than this, that these parties had been in Ottawa, and that Macdonald was not in favour with the government at Ottawa, and that the government was against them, and that these New York gentlemen did not think it wise or prudent to enter into an arrangement with a man to whom the government was adverse. Under these circumstances, Mr. Brydges sends them Mr. Worthington, and that is in pursuance of an application that Macdonald had made to Brydges for the purpose of knowing whether he could get a man into the partnership, and Worthington comes in pursuance of the arrangement. Well, under these circumstances, it does seem very extraordinary that Worthington should have consented, or would have consented to pay \$12,000 to get into this firm whose business he was to supply with the means to carry on. It is not a likely thing to have occurred, and Mr. Worthington says it did not occur, and that is contradicted by Mr. Macdonald; but the probabilities are in favour of Mr. Worthington's view of the case. And then again in favour of Worthington's view of the case was the conduct between the parties, and the subject of interest which was discussed between them in the notary's office.

"There Worthington was claiming to have interest allowed him on account of the sum he had to pay to release the plant from Morland, Watson & Co.'s claim. That was discussed, and I believe it was opposed by Macdonald, but finally it was acquiesced in—they made an agreement

to that effect. If it was a matter of so much importance to Worthington to get into this concern that he was going to pay \$12,000 to do it, it is not likely he would stand out for the payment of interest.

"Then the agreement allows nothing for Macdonald's capital that he was to bring in. On the whole the dealings of the parties seem to favour the construction placed upon that agreement by Worthington rather than the forced construction desired to be placed upon it by Macdonald. I do not agree with Mr. McCarthy's statement of the law, that where property is brought in by one partner into the firm as his stock, that he is entitled to take that out at the dissolution of the partnership. I think the property brought in by a partner becomes the property of the firm unless there be a stipulation to the contrary—that it is divisible between the partners in the same ratio as the profits of the firm; and I do not find in the cases that I have referred to, in the laws of the Province of Quebec or the civil code, that there is any law justifying a different conclusion from that at which I have arrived. The code seems to recognize the property thus, and that on the dissolution of the firm the property shall be sold and divided between the parties. Having come to that conclusion in regard to the meaning of the agreement I do not think it necessary to say anything about the last subject discussed, that is, as to whether the agreement referring it to arbitration is outside the jurisdiction of the Court or not.

"I think the plaintiff in this case has failed in making out the case he made by his bill, and that his bill will have to be dismissed."

The appeal came on for argument on the 21st November, 1881, and the 10th January, 1882.*

McCarthy, Q. C., and *J. McDougall*, for the appellant. Upon a reasonable construction of the articles of partnership the appellant and his two sons, who were in partnership with him, were entitled to credit in the partnership books for the sum of \$40,000, the value as agreed on of the plant, &c., brought into the partnership by them.

In partnership transactions the capital account is dealt with on principles altogether different from that which govern the distribution or allotment of profits. Partners may be entitled to share equally in profits who have contributed in very different proportions to the capital; nevertheless in taking the final accounts of the partnership each will be entitled to credit for the amount of capital

* *Present*.—SPRAGGE, C. J. O., BURTON, PATTERSON, and MORRISON, JJ.A.

brought in by him : *Ex parte Owens*, 4 DeG. & Sm. 351; *Lindley* on Partnership, 3rd ed., vol. I, 696, vol. II, 858. Here the partnership articles are express on certain matters : that the plant, &c., belonging to the Macdonalds were to be brought into the copartnership as the capital stock of the concern : that the respondent who was to pay the sum for which this property had been mortgaged, was to be recouped for that as well as other advances which he might make out of the "business and profits" of the partnership, and upon such payment the plant was to become partnership property; and to make it clear in what proportions the parties were to be interested in, for greater certainty, defines that the Macdonalds, although three out of the four partners, were to have one moiety, the respondent the other; and this result would not have followed without express agreement. In no part of the partnership articles or in any other manner is it shewn that the partners who brought in this capital are not, as in ordinary cases to be credited with it. The fact that a value of \$40,000 was placed on this plant is only to be explained on the assumption that the appellant's contention is right; on no other possible assumption was it necessary to value the property; and in the absence of an express agreement that the Macdonalds were to contribute the property without compensation the Court will not imply an agreement to that effect : *Lindley*, vol. i. pp. 670, 671; *Bell's Commentaries*, vol. i. 231.

In any event the Macdonalds would be entitled to credit for the \$40,000, the agreed value, as against the charge of the \$24,000 paid to redeem the property.

If the articles of partnership mean what the Court below has determined them to mean, the evidence establishes that there was a mutual mistake, and there ought to have been a decree for their reformation. The evidence is clear and uncontradicted as to this; and even if the evidence falls short of establishing such mutual mistake as the Court deems sufficient for reforming an instrument, then this being a matter collateral to the contract itself parol evidence could

be received, and the plaintiff's case in this view of the evidence was free from doubt: *Mason v. Scott*, 21 Gr. 629; *Erskine v. Dean*, L. R. 8 Ch. 756; and cases there cited.

S. H. Blake, Q. C., and *W. Cassels*, for the respondent Worthington:

The articles of partnership correctly embody and express the whole agreement and understanding of the parties in reference to the plant in question, and the construction placed thereon by the Court below is correct.

The evidence entirely fails to establish a mutual mistake, and in view of Worthington's express denial there can be no alteration or rectification of the articles: *Campbell v. Edwards*, 24 Gr. 152; *Dominion Loan Society v. Darling*, 5 A. R. 576, and authorities there cited.

No case is made by the bill entitling the plaintiff to give evidence of an alleged collateral parol agreement, and Worthington had no knowledge or notice that the plaintiff relied upon such collateral agreement until the argument of this cause. Relying on the judgment of the Vice Chancellor as to the construction of the agreement, and on his finding that there was not sufficient evidence to rectify the same, Worthington did not call any evidence on the point; and the case made by the bill of complaint is inconsistent with the contention raised on this appeal that there was a collateral parol agreement.

Subject to the objections taken that no case was made by the bill, entitling the plaintiff to give evidence, or rely upon a parol collateral agreement, counsel contended that the alleged oral agreement on which the Macdonalds relied could not be regarded as collateral to the articles, because the articles having made provision for the distribution of the plant, and particularized the matters for which the respective parties should get credit, and at the same time excluded credit to the Macdonalds for the plant, must be construed to involve the whole agreement of the parties in reference to the plant; that the oral agreement therefore was inconsistent with the articles and could

not be considered as collateral to them; that this case was distinguishable from *Mason v. Scott* and *Erskine v. Dean*—see also *Losee v. Kezar*, 5 C. P. 234; and the evidence here was not sufficient to establish any oral agreement collateral to the written agreement.

It was further contended that the plaintiff was not entitled to a reference, as under the articles, it is provided that any dispute or difficulty arising between the parties shall be left to the decision of arbitrators, to be chosen by the parties in the manner pointed out in the articles of partnership.

Bethune, Q. C., for the respondents Macdonald.

The other facts of the case, and the authorities relied on, appear in the judgment.

September 23, 1882. SPRAGGE, C. J.—The articles of agreement for partnership out of which the litigation in this case has arisen, bear date the 29th of March, 1875. The parties had been in negotiation for some weeks previously.

The three Macdonalds—the plaintiff and his two sons—the defendants of the same name, contractors for works on the Lachine canal, had, before these negotiations with the defendant Worthington, been in treaty first with one and then with another party with a view to a partnership, and inventories had been prepared of the plant possessed by the Macdonalds for the carrying on of the work, and of its value by items; the one dated the 10th December, 1874, shewing as the aggregate value the sum of \$64,430: the other dated the 27th January, 1875, shewing as the aggregate value \$57,130; the difference being accounted for by the absence from the latter of an item of about the value of the difference.

Counsel for Worthington make it a point in the case that the Macdonalds were in urgent need of pecuniary assistance and unable without the aid of some person or persons of means and credit, to carry on their work; and a good deal of evidence has been given in order to shew

this ; the object of this evidence being to shew that their necessities were so great that they had no alternative but to make sacrifices, and to agree to terms to which otherwise they would not probably have submitted.

Their position then at the date of their first entering into negotiations with Worthington, was shortly this : They were engaged upon two works of considerable magnitude ; one entered into by themselves with the government in October or November, 1873 ; and another of about the same date, entered into by Messrs. Le Maire & Bouey, and assigned to the Macdonalds in March or April, 1874. The Macdonalds paying to Le Maire & Bouey \$15,000 as a consideration for the assignment.

At the date of these negotiations, the Macdonalds had become greatly straitened for means to carry on the works. The cost of the works was to be over \$1,000,000, and they had already expended a large amount in preparing quarries procuring plant and materials, and in part construction of the work, which is estimated by Macdonald, the father, in his evidence, at about \$190,000 ; and he says that what they had received from the government was less by some 25 or 30 per cent. than the sum they had expended. In this way he makes out that the earlier part of the work was unprofitable ; the profit was expected to be, and was, realized upon the later portion of the work, and this is confirmed by the evidence of McCracken and others.

The government, it appears too, was not satisfied with the progress or rather the rate of progress of the work, and there may have been some apprehension of failure on the part of the Macdonalds to proceed with the work in accordance with the contract, and of consequences disastrous to themselves being the result, involving the loss of the contract, and with it possibly the loss of the drawback, about \$13,000 retained in the hands of the government. It was therefore an object of very great importance to the Macdonalds, it is not too much to say that it was a necessity of their position, that they should obtain the aid of a

person of means and credit, which would, as they say, enable them to carry on the work, and not only so, but to carry it on more profitably ; and the mode in which they proposed to themselves to obtain such aid was by taking a partner into the concern.

I have put it that it was a necessity of the position of the Macdonalds to obtain aid in money or credit or both in the future prosecution of their work. On the other hand, a person joining them as a partner at that stage of the work, would come in under great advantages. Worthington came into the concern to receive one-half of the profits, and they were expected to be large, the three Macdonalds together to receive the other half; and the Macdonalds were to answer all debts previously incurred in purchase of plant and materials, in preparing for the work, and in the work of construction itself. The initiatory difficulties had been surmounted ; leaving, however, the Macdonalds crippled in their means and needing aid. At the same time a person rendering that aid as a partner would enter upon the work freed from the difficulties and losses which were incident to such a work at its commencement.

The Macdonalds estimate the loss to themselves and the gain to Worthington on his being taken into the partnership, at the time, and upon the terms at which he became a partner at \$30,000. I have no means of judging with any degree of accuracy whether that is an over estimate or not. It does not strike me as necessarily extravagant. It does, at any rate, seem obvious, that entering a profitable enterprise as a partner at such a time, and upon such terms, presented very considerable advantages to an incoming partner, advantages so patent to the clear vision of the very intelligent and enterprising class of men of whom the contractors of this and the neighboring country are composed, that the Macdonalds would not necessarily be in despair of finding a partner even if Worthington had failed them.

These considerations are not beside the question at issue when it is pressed upon us that the Macdonalds must be

taken to have been prepared to concede almost any terms that Worthington might have asked, and I have touched upon them now as part of the surrounding circumstances, and so properly taken into account upon the question of construction of the articles of partnership entered into between the parties, as well as upon the question of the rectification of the articles.

Another circumstance to be taken into account is, that the person by whom the articles were drawn, Mr. Normandeau, was a professional man, a notary of the Province of Quebec; and that he drew the instrument, having in his mind the law of the Province of Quebec as understood by him, and upon his understanding of which he gives evidence.

He states the law of Quebec in regard to partnership to be, that the contribution of each partner to the capital stock remains his property, that it is only for the use of the firm during its continuance, and reverts to him afterwards, unless especially excluded. He says: "By law, if we do not exclude the plant,—stock put in by one partner into a concern continues to be his property the moment you do not exclude it and give it to the other in express words. * * As to the division of the assets of a partnership at the time of the dissolution, if the assets have not been divided between the parties by any instrument in writing each one takes out his own before dividing the profits * * unless some instrument in writing has otherwise disposed of it."

He goes on to speak of how he would have drawn the instrument if he had not assumed that, according to the law of Quebec, the property in the plant would remain in the Macdonalds, and says that he might have been more explicit. I will refer to what he says in respect to his drawing this particular document when I come to the other branch of the case, the question of rectification.

The law of Quebec, as stated by Mr. Normandeau, might be very material upon the question of construction, if the articles of partnership drawn by him had been silent as to the disposition of, and property in, the plant brought into

the concern by the Macdonalds, inasmuch as according to his view of the law, the Macdonalds would retain the ownership of the plant, the firm having only the use of it during the partnership, and the plant itself reverting to the owners of it at the close of the partnership. Did the notary mean that the plant should, the whole of it, be and remain the property of the Macdonalds, subject only to the lien of Worthington, until his advances should be repaid. Does the document import this? If that had been intended, it might have stopped with providing for that charge, and how it was to be satisfied. Freed from that charge the law would settle the question of property. But an express provision is made. Then is it made in accordance with what the law would provide without express provision, or to take it out of the rule of the law? The latter is *prima facie* to be presumed; but apart from presumption how is it to be construed? The first part of it says that after the charge is satisfied the whole of the said stock (*i. e.* the plant, &c.) "shall become the property of the firm of James Worthington & Co." According to English law that means that the right of property, not the right of user, only would thereupon be in the firm. According to the law of Quebec, as interpreted by Mr. Normandeau, it would mean the right of user only during the partnership. Then, as if to clear up all doubt as to the meaning of the words used, the instrument goes on, "that is to say, the one-half thereof shall revert to, and belong to, the Macdonalds, and the other half to Worthington." If the instrument meant that after the charge was satisfied, the plant should belong, freed from that charge, to the party who had brought it into the partnership, it would have said so, if it said anything; but instead of saying so, it says in express words that one-half thereof shall belong to that party; and then disposes of the other half by providing that it shall belong to Worthington; the words "belong to" being used in regard to the half that was to go to Worthington as well as to the half that was to go to the Macdonalds. The words mean proprietary right, and

there is nothing to indicate that they were used in other than the same sense as to both. The conclusion appears to me inevitable that the articles in question cannot be construed otherwise than as an agreement that, upon the charge being satisfied, one-half of the plant, and only one-half, should be the property of the Macdonalds, and that the other half should be the property of Worthington. The construction would, in my judgment, be the same if the law of Quebec in relation to capital put into a partnership by a partner were the same as our law. The instrument makes it the subject of express agreement, and whatever law might apply to such an agreement, the construction would be the same.

Upon the question of rectification I fully subscribe to the rule that relief will only be granted where, as put by Mr. Justice Story, Eq. Jur., sec. 157, there is "a plain mistake clearly made out by satisfactory proofs," or as Lord Chelmsford expresses it in *Fowler v. Fowler*, 4 D. & J. 264: "The power which the Court possesses of reforming written instruments where there has been an omission or an insertion of stipulations contrary to the intention of the parties, and under a mutual mistake, is one which has been frequently and most usefully exercised. But it is also one which should be used with extreme care and caution. To substitute a new agreement for one which the parties have deliberately subscribed, ought only to be permitted upon evidence of a different intention, and of the clearest and most satisfactory description." The rule that evidence of such a character is required is a most salutary one, and is indeed the only safe rule, and it has, I think, been observed with scrupulous care whenever that branch of the jurisdiction of a Court of Equity has been invoked in this Province.

What the Macdonalds seek to establish upon this head is, that it was agreed between them and Worthington that the agreed value of the plant in question should be allowed to them in the accounts of the new firm; and that it was by mutual mistake that a stipulation to that effect was not inserted in the written agreement.

They have to encounter the difficulties that the agreement was not hastily entered into, that they had reasonable time and opportunity for examining the instrument before they executed it, and that they are men of business capacity conversant it is to be presumed, with agreements of that nature, and that if in truth the agreement was what they contended it was, we should expect to find a stipulation to that effect in the written instrument itself.

I will take first the last named difficulty, which has always appeared to me a very serious one where, as in the case here, the parties to a written agreement were men of good business capacity.

The difficulty is to some extent diminished by the evidence of the notary, and by the fact of the instrument being drawn by him in the province of Quebec, he having in his mind the law of that province in relation to capital brought by a partner into a concern. I have quoted his opinion upon that point. It is not very material whether what he gives us as the law is the law of Quebec or not. The thing to be accounted for is the absence from the writing of a stipulation as to this plant, and if we find that he omitted it because in his judgment the Macdonalds would be entitled to be allowed for it by the law, without express agreement, the objection loses much of its weight.

The plant and its value were much discussed between the parties before they went to the notary. I will refer to that presently, but the notary says this: "That this \$40,000 worth of plant was the contribution by Macdonald & Co., the party to the deed, towards the capital of the partnership; there was nothing told to me at the time that they should not be credited with it, to the effect that they should not be credited with the amount that they put in." And he says (p. 108): "That he drew those articles to carry out, or assuming that they would carry out in that way what he had explained to be his view of the law," and adds: "If I intended to make a transfer of the property, of that stock, from one party to the other, I would have expressed it in much more explicit terms, I would declare

that he would hold it at the end of the partnership, and so forth, as we always do."

The notary tells us in his evidence that he is "not English," meaning, of course, that his vernacular language is, like his name, French. This may account for some of the language used by him being not that of an English speaking lawyer.

There is nothing in the articles which negatives in terms the position of the Macdonalds, that they were to be allowed for the plant brought in by them; though it must be conceded that the article No. 4 setting forth that the stock of the new partnership "consists of the whole of the plant," describing it generally, and then making such disposition of it as is made in the concluding part of the same article, does *prima facie* import that it was part of the contract of partnership that the plant should go into the concern as one of the considerations given by the Macdonalds to Worthington for becoming their partner.

At the same time it would consist with every other provision in these articles, that one should have been inserted, that the Macdonalds should after repayment of the agreed \$24,000 advanced by Worthington, be entitled to be credited for the value of the plant in the books of the firm. We find no such provision, however, and the significance of its absence as a piece of evidence is only diminished, by looking at the document through the notary's standpoint, with his notions of the *lex loci* applying to it.

So far there would obviously not be sufficient for the rectification of the instrument.

We have further, however, the direct evidence of the three Macdonalds, that it was part of the agreement that they should be credited in the partnership books with the agreed value of the stock; with some corroborative evidence by Mr. McCracken, who was for some years in the employ of the firm as book-keeper; and there are also some circumstances to which I will advert. The notary has also given evidence as to his recollection of what passed

between the parties. What he says is in favour of the plaintiff's contention, but it is apparent from his own frank statement of the conversations between the Macdonalds and himself, that we cannot be sure how much of what he says is from his own recollection, and how much from the suggestions and reminders of the Macdonalds; and how much takes the shape in which he puts it from the impress given to it by the Macdonalds. To take then first the evidence of the Macdonalds themselves. It is objected to their evidence that they do not give the same account of what passed.

It is true that there are some matters of detail in which they differ; but their evidence was given rather more than six years after this partnership was entered into, and such discrepancies as have been pointed out may be due to honest differences in recollection. They are not necessarily attributable to wilful untruthfulness. They all state explicitly that it was part of the agreement between themselves and Worthington that the plant was to be taken as capital brought in by them, to be allowed to them in the accounts between themselves and the firm, and it appears not only from their own evidence, but from that of McCracken also, that they asserted such to be their right on the first fit occasion that presented itself after the formation of the partnership.

How this claim was received by Worthington is material. There was at the time no denial of it by Worthington, but he appears to have evaded any direct recognition of it, and his answers were regarded as evasive by McCracken. A noticeable feature in these transactions is that the Macdonalds, as well as the notary, have all along considered that the right to be allowed for the plant was provided for by the articles of partnership, not, perhaps, provided for in express terms, but read with the law of Quebec as explained by the notary, that such right is provided for; and one of the sons says in his evidence, that before the execution of the articles he inquired of the notary whether it was so, that he was informed that it was, and that he communicated to his father the answer to his inquiry.

It appears to me that the nature of this claim, and the relative position of the parties, are material upon this part of the case; and I will, in the first instance, consider it apart from the necessities which it is suggested may have impelled the Macdonalds to agree to terms disadvantageous to themselves.

To take the case of a contractor having a large contract, himself conversant with the work of construction, but desiring to associate with him a competent person, whose chief department it should be to manage the financial business of the contract, and he may be influenced by the consideration, that with their joint means the contract would be better and more profitably carried out than it could be by himself; the work may be of such magnitude that he apprehends that his own means will be insufficient, and that he looks for a partner with larger means and better credit than his own.

Take the case of such a contractor having got together plant, material and other appliances for the work of the value of say \$40,000, and that work on the ground has not yet been commenced. Take the case of two such men as I have described agreeing to enter into a partnership, to share equally the profit and loss of the enterprise; the contractor putting into the concern his plant, materials, &c., to be used in the work, and to become partnership property. There is evidence that in such a case the partner brought into the concern would pay to the original contractor one-half the value of such plant, or be charged in account between them with one-half such value. But it needs no evidence to prove this. It could not be for a moment doubted that it would follow of course upon a contract for partnership unless excluded by express agreement. If it were not so, the original contractor would be making a present of \$20,000 to the incoming partner. Plant so brought into the work would fall within the principle of the rule where capital is brought into a partnership; in which case the partner bringing it in, is credited in the books of the firm with the amount.

One would naturally expect, in the draft of articles for the formation of such a partnership, that if it made provision for plant so brought in becoming partnership property, the half to belong to one partner, and the other half to the other, as is the case in the articles in question here, that it would also provide for the owner of the plant being credited with its value. It is, however, sufficient to say that a provision that he should be so credited would be in accordance with the rights of the parties.

There is nothing to differ this case from the one that I have put, in principle ; and the only difference in circumstances is, that the work had made some progress—a difference, as I have endeavored to explain, in favour of the incoming partner—and that it was a necessity to the Macdonalds to be aided with money and credit. And as to this necessity, it does not follow, logically, that because such necessity existed it is a proper inference that the Macdonalds agreed to forgo a clear right of great magnitude resulting from their position, in effect to make the incoming partner a present, as I have said, of \$20,000.

I may as well refer here to the \$24,000, which was to be advanced by Worthington to pay off the lien of Morland & Watson upon the plant ; and for which he was to be recouped out of the profits of the new partnership. The learned Vice-Chancellor, in giving judgment, put it that as Worthington was to be repaid out of the profits of the partnership, to the one-half of which profits he was himself entitled, he would really be paying \$12,000 for getting into the concern. I agree that that would be so. The learned Judge thinks this very improbable, looking at all the circumstances. But then it is quite clear that he was to make that advance, and that the advance was to be repaid in that way : the articles state this quite clearly.

Now, there is no necessary connection between the \$12,000 and the \$20,000, or between the two sums of double those amounts ; but the argument seems to be this: "It is so improbable that Mr. Worthington would have paid in effect \$12,000 as a premium for getting into this part-

nership, that it is rather to be inferred that the Macdonalds paid him \$20,000 as an inducement—a premium to him to come into it. I do not think such inference a just or necessary one. It would be assuming that Worthington had the will and the ability so to avail himself of the necessities of the Macdonalds as to drive a hard and unequal bargain with them. Looking at all the circumstances—the work done, and the outlook as to future profit—\$12,000 might, at that date, be well looked upon by Worthington as a small sum for admission to an equal share in such a contract. His paying such a sum cannot, in my judgment, be regarded as of any weight as a piece of evidence that his partners were to forego, in his favour, their clear rights in respect of the capital brought by them into the partnership.

A circumstance tending strongly to shew that the Macdonalds themselves had no idea of foregoing that right, is that in their treaties with other parties before negotiating with Worthington, it was assumed all round by those parties, by the Macdonalds themselves and by McCracken, that they were to be allowed for the plant; and the two inventories to which I have referred were prepared in order to get at the sum to be allowed. The amount was not objected to, but the treaties fell through from a very intelligible cause, a belief entertained by the other parties, that the Macdonalds were not in favour with the Public Works Department at Ottawa. These other parties were, or one of them was, American.

That circumstance, the preparing of these schedules and their purpose, can, however, only have weight on the score of probabilities; but there is another circumstance tending to bring home the question of knowledge and assent to Worthington himself.

McCracken, after stating that the Macdonalds had from the first assumed the position that they were entitled to credit for the plant, says in answer to a question put in this way by Worthington's counsel: "You never discussed with Mr. Worthington any reason for not crediting the plant to Macdonald & Co.?" His answer is: "Yes, I think

so ; the fact that it was under mortgage was the reason assigned. When those books were opened, to the best of my recollection, that matter was spoken of, and to the best of my recollection that was the reason assigned for not entering the credit, or not making a note of the plant in some way." If McCracken's recollection was correct, what passed between him and Worthington involved an admission, that the Macdonalds were entitled to credit for the plant, and the only question was whether the proper time for making the entry had arrived.

There is another circumstance which is established beyond question as a matter of fact, and is, to my mind, of very great weight upon the question at issue. It is the discussion, the repeated and earnest discussion, between Worthington and Macdonald, the father, and one of the sons, as to the value of the plant. The inventory stating the aggregate value to be \$57,130, was exhibited to Worthington as shewing the value ; he objected to it as an over-estimate, and claimed that \$40,000 should be taken as the value. The Macdonalds debated among themselves whether they should accede to this. Worthington made it a great point that the value should be taken at that sum. I judge from the evidence that it was a point more keenly discussed, and with more interest in the discussion, than any other. It was a matter of great interest to both parties if one of them was to be credited with the amount which they should agree upon as the value ; of no interest whatever to either what was to be taken as the value, if no credit was to be given in respect of it, \$17,000 ; (and a trifle over) was the difference between them, a difference to each party of over \$8,500. One can understand there being repeated interviews and animated discussions with such a sum at stake, but it is utterly unintelligible if credit was not to be given, for the simple reason that if credit was not to be given it would not make one dollar difference to either party whether the value were taken at \$57,000 or \$40,000.

There is just one other view in which the amount might

be material. The plant and materials were to pass into the actual custody and care of the Macdonalds. If any were not forthcoming or accounted for, there was the inventory shewing the value of each item to be referred to; but in that view it was the interest of Worthington that the higher valuation, not the lower one, should be taken as the true one. I have endeavored to think of some reason why Worthington should press persistently, as he did, for this reduction in the valuation of the plant. I have been unable to conceive of any, unless he was to be a gainer by the reduction. He would be a great gainer if the firm was to be charged. If not to be charged, he was insisting pertinaciously upon a matter of no interest to him, and the Macdonalds were doing the like; for if they were not to get credit, they were fighting about nothing. I have always been of opinion, and my judicial experience has confirmed me in the opinion, that the conduct of parties in their dealings with one another furnishes a better key to the true nature of their dealings than perhaps anything else.

This matter of the value of the stock, is a piece of conduct on the part of Worthington which I regard as a piece of evidence of the greatest weight, inasmuch as it is consistent with no other theory than that the Macdonalds were to be entitled as between themselves and the firm to be credited with the agreed value of the stock, as so much value brought into the partnership.

The learned Vice-Chancellor, before whom the cause was heard, held that the evidence given by the plaintiff in order to shew what was the real agreement of the parties in respect of the point in issue, was not sufficient to establish the fact contended for, viz., that the Macdonalds were, by the agreement between the parties, to have credit for the stock, and in that respect to reform the articles, which in his judgment do not entitle them to such credit. He does not say that he discredits the evidence given, but he holds it insufficient to reform the articles. With great deference I am unable to agree in his conclusion. I have read and

compared the evidence very carefully, and portions of it repeatedly, and have endeavoured to give due weight, and no more than due weight, to the various circumstances that appear in the case. The result to my mind is, that there is not only a preponderance of evidence in favour of the plaintiff's case, but that it is of such weight and cogency as to exclude reasonable doubt that the agreement stated by the plaintiff was the true agreement entered into between the parties. To my mind the evidence is so satisfactory and convincing upon that point as to fulfil the requirements of the rule in relation to the rectification of written instruments. I have placed my judgment upon that ground, as the opinion that I have formed upon the construction of the articles is against the contention of the plaintiff. If upon that I should be in error, he will have that point also upon which to rest his case.

Powell v. Smith, L. R. 14 Eq. 85, cited by counsel for Worthington, has not, in my opinion, any application to such a case as this. The bill in that case was upon a contract by the defendant to make a lease to the plaintiff for seven or fourteen years, upon the faith of which he went into possession, farmed the land, and expended a considerable sum in improvements. The only defence that it is necessary to notice was, that the defendant believed that he, as well as the tenant, had the option of determining the lease at the end of the first seven years. The plaintiff deposed that he signed the agreement for lease with the full understanding and belief that the lease would only be determinable by himself. It could be no defence in such a case that the defendant was mistaken in his law, and that was the point decided. It was a clearly untenable defence to the case made and proved by the plaintiff. There was in that case no mutual mistake. It was not shewn, as must be shewn in a suit for the rectification of a written instrument, that neither of the parties intended the agreement to be such as the writing expresses it to be. Where it is shewn by evidence, with all the clearness that it must be shewn, that the agreement expressed in a writing is not

the agreement really made between the parties, but that something else was the real agreement between them, it would not, in my opinion, be an answer to a bill for establishing the real agreement that both parties believed that the writing did in fact express the true agreement. I see no reason why it should, and *Powell v. Smith* is not an authority for it. The rule is satisfied when it is shewn that there has been mutual mistake; that there has been an agreement, and that the writing does not express it, whether the parties did or did not think at the time that it did express it. Their opinion upon that point has nothing whatever to do with the grounds upon which relief of this nature is decreed.

In my view of the case, it is not necessary to consider the other points argued before us.

In my opinion the plaintiff is entitled to a decree for the rectification of the articles of partnership, prefaced by a declaration of the rights of himself and the defendants Macdonald to credit in the accounts of the firm, for the agreed value of the plant, material, and appliances brought by them into the partnership; and therefore the appeal should be allowed with costs.

BURTON, PATTERSON, and MORRISON, JJ.A., concurred.

Upon the preparation of the certificate of the judgment of the Court the solicitor of Worthington objected to the form in which the Registrar had prepared it, and thereupon served notice of motion to vary the minutes, which came on before the full Court on the 19th November, 1882.*

W. Cassels, in support of the motion, asked that the order should refer the case back to the Court of Chancery in order that the defendant might be examined, insisting that under the circumstances the parties were in a position similar to a nonsuit at common law under the former practice.

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McCarthy, Q. C., contra, contended that this was not a case calling for the relief contemplated by the present application. At the hearing counsel for the defendant deliberately chose to rely on the position then assumed by him, and advisedly refrained from calling evidence after he had obtained that of Mr. Ritchie.

November 30, 1882. PATTERSON, J. A.—Mr. Cassels has moved, in pursuance of a notice given to the plaintiff, to vary the certificate of the judgment of this court, as settled by the Registrar, by striking out the order to take the partnership accounts and give credit therein to the plaintiff and his sons for \$40,000, and, by substituting an order to remit the action to the Court below for the conclusion of the trial by the taking of the evidence which the respondent James Worthington may adduce in support of his defence.

We are thus asked, under the name of varying the certificate, to review the judgment pronounced, and to frame it so as to give the respondent something not asked for either in the formal reasons against the appeal or during the discussion of the appeal.

It is not necessary further to notice the novelty of this mode of rehearing an appeal, because it is plain that the application, even it had been made in the most regular manner, ought not to succeed.

It is based upon an assumed analogy between the dismissal of the plaintiff's bill by the learned Judge at the trial, and the entry of a nonsuit when in the opinion of the Judge there is no evidence to leave to the jury in support of the plaintiff's case. If the Court in *banc* thinks the nonsuit improper, a new trial follows of necessity, because the evidence has been withdrawn from the tribunal whose office it was to pronounce upon it and to find the facts. When a Judge tries a case without a jury the position is very different. He has to decide the facts as well as the law, and his decision upon the facts is subject to review by a Court which has the power, not merely to say he was wrong, but to give the judgment he ought to have given.

This was always so in Courts of Equity. In our Common Law Courts, during the latter years of their existence, it was so under the provisions of the Law Reform Acts. It is so now in all the Divisions of the High Court of Justice.

The Judge decides that the evidence is insufficient to prove the issue. His conclusion may be arrived at after balancing the evidence as a jury is supposed to do, or he may be so fully satisfied that the evidence is all one way. that, if he were trying the case with a jury, he would say there was no evidence fit to submit to them. In either case he is deciding upon the evidence, and his decision may be mistaken and may be overruled. The Court of review may say that testimony which in the Judge's opinion did not touch the issue really proves it. In the one case the nonsuit is set aside and a new trial ordered, that the evidence, which the Court holds proper to go to the jury, may be pronounced upon by the jury; in the other, the court, discharging the functions of a jury, must itself pronounce upon the evidence.

If the principle were admitted that at the close of the plaintiff's case the defendant, in reliance upon the expressed opinion of the Judge, might forbear to call evidence, and then, when the Judge's view was disapproved of, claim a new trial in order to give the evidence, the same rule must apply to both parties and to all stages of the hearing. For example: the Judge might think the plaintiff had made out a *prima facie* case, but that the defendant's first witness had effectually displaced it. If the defendant thereupon forebore to call more witnesses, or adduce further evidence, the practice now contended for would entitle him to a new or further trial in case the Court happened to regard the evidence differently.

The analogy to the nonsuit does not hold in any particular, and the principle relied on for the defendant cannot be admitted to exist.

It has been urged that convenience requires it, because, if not admitted, litigants will always be forced, for their own safety, to call all their witnesses; and thus a large

expense and loss of time will often be incurred for no useful purpose.

There may sometimes be an evil of this kind to be deplored, but it is to be feared that the proposed remedy would scarcely reach far enough. The evil may be more conspicuous in one case than in another, but the cases in which a large part of the expense in the matter of evidence is unavoidably thrown away form a considerable proportion of those tried, and are not confined to the class under which it is attempted to bring this one. It would not usually be practicable, and, if practicable, it would not always be fair to the litigants, to treat the first trial, in the way proposed by the present motion, as merely the first stage of a trial which was to be taken up where it was left off. In most cases the new trial would involve the commencement *de novo* and the repetition of all the expense formerly incurred. Then what of the costs of the first trial? A plaintiff might well complain of having a double set of costs to pay, as whether he ultimately won or lost, he would not, under the established practice in these matters, recover from the defendant the costs of the first trial. It is by no means clear that the rule for which the defendant contends would tend on the whole either to saving of money or time. The contrary would more likely be its effect.

The true principle, in case of trials by a Judge without a jury is that the evidence should be fully given before he is called upon to decide. His decision should be a finding upon the issue, and not an opinion on a portion of the evidence only.

This rule does not, as it is scarcely necessary to say, stand in the way of any arrangements or understandings which, in the progress of an action or of a trial, may be come to between the litigants, or made by the Judge with their assent. Cases will occasionally arise in which it may obviously be for the interest of the litigants themselves to obtain a decision on a question of law, or on the effect of some piece of evidence, before calling witnesses to prove

facts which may be decided to be immaterial. All we have now to decide is, whether there is such a rule as that on which the defendant relies which can be insisted on as a matter of right, and we hold there is no such rule.

The present case is a favorable one for the present decision, because we can pronounce it without apprehension that the defendant is taken by surprise or dealt with unjustly.

The shorthand writer's report of the trial, as printed, shews that counsel for the plaintiff expressly objected to argue the case until the evidence was closed, and insisted that, if the defendant did not call witnesses, he forbore at his own risk. It shews moreover that the defendant did call a witness after that discussion, although not upon the fact of the real agreement between the parties, on which the question of the reformation of the instrument to a great extent turned. We have also the advantage of seeing the report of the judgment delivered by the learned Judge, and from that it is perfectly clear that no foundation remains for arguing that the judgment in any way resembles a nonsuit. I have already pointed out that, even if the Judge entertained the idea that there was no evidence in support of the issue, that very idea would be an opinion respecting the testimony which would be subject to review; but here the Judge does not adopt any such idea. On the contrary he carefully examines the evidence given, and reasons upon and weighs one part against another. He submits it to himself as he would have had to do to a jury, and he gives his verdict upon the evidence. His judgment is a verdict and not a nonsuit.

Add to these considerations one more, namely, that we have nothing before us, either in the form of statement at the trial or affidavit made since, to shew that the defendant had any evidence to give, or intended to give any, or was led to adopt the course he took in reliance on the existence of the rule he now asks us to act upon.

It is so usual to find the parties to actions going into the witness box on their own behalf, that it might be surmised

that the defendant had at least one witness, viz himself. Whether he was present at the trial or not, we ought not, without being clearly satisfied that his claim is established as a matter of right, to deprive the plaintiff of the protection he sought when he declined to discuss the questions at issue in the presence of persons who were to be called as witnesses.

Questions very much like those now raised were before this Court some years ago in the case of *Herbert v. Park*, 25 C. P. 57. That was a case tried by a Judge without a jury, in which he had entered a nonsuit with leave to move to enter a verdict for the plaintiff. It was there urged that if the nonsuit was considered improper, a new trial should be granted to enable the defendants to go into their evidence; but, in that case, as in this, no evidence was shewn to have been excluded which the defendants might not, if they had seen fit, have adduced at the trial, and a verdict for the plaintiff was ordered.

The motion must be refused, with costs.

SPRAGGE, C. J.—I agree in the judgment just delivered by my brother Patterson. He has discussed the matter so fully, that I will add but a very few words.

One serious objection to the Court acceding to this application is the inconvenience and disadvantage to the plaintiff that it would entail. In the first place, is the whole question to be gone into? Is the plaintiff to prove his case over again? It would place upon the plaintiff a most onerous obligation; expensive and difficult, as well as most unreasonable under the circumstances which occurred at the trial of this case.

If the plaintiff is not put to prove his case over again, the Judge hearing the case would be in an anomalous position. He would have to weigh evidence which he had not heard, and the plaintiff might lose thereby the advantage of his having his case decided by a Judge who had heard his evidence. He would also be at the disadvantage of having his case disclosed to his adversary.

There is nothing in the course taken by the defendant Worthington to entitle him to place the plaintiff in so disadvantageous a position as he would be placed in, if this application should be granted.

At the conclusion of the plaintiff's evidence, counsel for the defendant Worthington objected that the plaintiff had not shewn sufficient to entitle him to rectify the articles, and contended that the articles would not bear the construction contended for by the plaintiff; and the learned Vice-Chancellor expressed his assent to these views. Mr. McCarthy then asked the Vice-Chancellor to note that he objected to argue the case, as it was undesirable to do so in the presence of the witnesses; and if the defence declined to call witnesses, they did so at their own risk. If the evidence was to be considered as being all in, then he (Mr. McCarthy) expressed his readiness to argue the case, but he knew of no rule of practice requiring him to argue the case before the evidence was closed.

The defence then called Mr. Ritchie, an advocate of Quebec, to give evidence as an expert and there stopped.

Counsel for Worthington then were certainly not taken by surprise. They took their course with full knowledge that plaintiff's counsel would insist that the case was to be decided upon the evidence then before the Court; and there is this further strong circumstance in the case, that we are not told, even now, that the defendant Worthington forbore to give further evidence in deference to the opinion in his favour expressed by the Vice-Chancellor, or that he had in fact any further evidence to give. Nor does the counsel for Worthington tell us now that he has at this time any further evidence to give. In my opinion the defendant Worthington has not made a case for the admission of further evidence.

Motion refused, with costs.

NEILL v. THE TRAVELLERS' INSURANCE COMPANY.

Accident policy—Voluntary exposure to risk—Practice.

An appeal from the Court of Common Pleas, who ordered a nonsuit after verdict for the plaintiff (31 C. P. 394), the Court being equally divided, was dismissed, with costs.

Per HAGARTY, C. J., and CAMERON, J.—The evidence shewed that the deceased had voluntarily gone unnecessarily into a place of danger.

Per BURTON and PATTERSON, J.J.A.—In an action upon an accident policy the plaintiff having proved a claim *prima facie* within the policy, it was for the defendants to shew that the deceased voluntarily exposed himself to unnecessary danger or one of the other defences set up. The nonsuit therefore was improper and a new trial should have been granted. One of the conditions of the policy was, that the insured should not stand or walk on a railway track.

Per CAMERON, J., and *semble per* HAGARTY, C. J.—Such condition was broken by the insured driving on, not simply crossing, a railway track in a buggy.

Per BURTON, J.A.—Such condition was intended to apply to the case common in Canada of persons using the railway tracks as roadways, and could not be considered as applying in every case of an accident to the insured while on such track.

THIS was an appeal by the plaintiff, from a judgment of the Court of Common Pleas, setting aside a verdict entered for the plaintiff and directing a nonsuit to be entered as reported 31 C. P. 394, where and in the judgments on the present appeal, the pleadings in the cause and the facts of the case are fully stated.

The cause came on for argument before this Court on the 18th of January, 1882.*

S. H. Blake, Q. C., and Watson, for the appellant. The evidence given at the trial was sufficient if believed by the jury to support the verdict for the plaintiff, and the case was fairly left to the jury, who found all the issues in favour of the plaintiff. The Court, therefore, in view of the evidence and the finding of the jury thereon, erred, it is submitted, in directing a nonsuit; *Wharton* on Negligence, sec. 420; *May* on Insurance, p. 667, and cases there cited. On the other hand no evidence whatever was given to support the

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defence that the deceased *voluntarily* exposed himself to "unnecessary danger, hazard, or perilous adventure;" and this being a question of intention, and the jury having expressly found that issue in favour of the plaintiff, their verdict was conclusive, and should not have been disturbed: *Blyth v. Bennett*, 22 L. J. C. P. 79. The word "voluntary," mentioned in the condition of the policy, means a "doing by design," and in order to have established that defence, the defendants should have proved that the assured designedly exposed himself to danger—that is, he must have known of the danger, and with such knowledge exposed himself to it. There was no evidence whatever to support such a defence; *Wharton's Law Lexicon*, p. 772; and what evidence was adduced, for the defence did not establish that the assured was engaged in any unlawful act at the time of the accident, and the jury have expressly found that he was not so engaged. What he was doing was driving along the track of the Northern Railway, and such an act has not been covered by the defence pleaded, and has not been provided against by any statute, or otherwise made unlawful under the conditions of the policy herein: *Fawcett v. York and North Midland R. W. Co.*, 16 Q. B. 610. It is shewn that the assured, at the time he sustained the injury which caused his death, was not unlawfully on the grounds of the Northern Railway in the sense of being a trespasser, as he had a right to go there, as he did, on business. The evidence does not establish that when the accident happened the assured did not then use due diligence; and further, it being a question for the jury to say whether or not such due diligence had been used, the verdict for the plaintiff upon that question should be held conclusive; and in face of that finding the Court will not undertake to say, as a matter of law, that any particular act or series of acts constitute a want of such diligence.

C. Robinson, Q. C., for the respondents. The nonsuit entered in this case, was proper. The policy contains an express stipulation that no claim shall be made

under it where the death happens in consequence of voluntary exposure to unnecessary danger, hazard, or perilous adventure. The deceased, whose life was insured against accidents, was killed on the main track of the Northern Railway Company by a locomotive engine. The evidence shews that he was at the time driving up the track in a buggy, having perfect control of his horse. The night was dark, the spot a most dangerous one, and was used solely for railway purposes. The deceased was familiar with the grounds, and must have known that he was proceeding to certain death. He was warned of his danger, but persisted on his course. Under such circumstances, the conclusion is irresistible that the deceased exposed himself to "unnecessary danger, hazard, and perilous adventure," and that such exposure was voluntary in the ordinary common-sense meaning of that expression, so that no claim can be made under the policy. Another express stipulation contained in this policy was, that no claim should be made thereunder when the death or injury happened while the insured was engaged in or in consequence of any unlawful act. Here it is contended that the deceased was clearly not only violating the rules of the Railway Company, but also the provisions of the Legislature in the Consolidated Railway Act of 1879. Standing or walking on a railway track or bridge are hazards not contemplated or covered by the contract of insurance, and the policy expressly stipulates that no sum will be paid for loss of life or disability happening in consequence of such exposure to any person other than railway employees, who shall have given notice of such occupation, and paid the fixed premium for such hazards. Counsel also contended that the finding of the jury was contrary to evidence, and should not be permitted to stand. Under the circumstances of this case a new trial would have been useless, tending only to create unnecessary expense, and the Court acted advisedly in ordering a nonsuit to be entered.

September 23, 1882. HAGARTY, C. J.—I am of opinion that the judgment of the Common Pleas is right, and that the appeal should be dismissed, with costs.

There was no contradiction whatever in the evidence. It was all one way, leaving, as I think, no real issue to be decided by the jury as a disputed question of fact.

On the plaintiff's own shewing the deceased was killed by the train coming against the vehicle in which he was driving alone on a dark night in what has well been called a network of railway tracks.

The plaintiff's witness said it was a dangerous place; that he never saw any one driving there before, night or day; no more dangerous place for a man to have a horse and buggy. The horse was partly on the track when the witness first saw him, just as they struck him.

The defendants' evidence merely makes this statement stronger as to the imminent danger of being in such a place, especially after dark.

Now, if there be any meaning in evidence, I cannot see how it was not clearly established that the deceased had knowingly exposed himself to unnecessary hazard and danger. He was seen deliberately driving into this labyrinth of tracks, a place he was well acquainted with.

Had his horse carried him against his will into such a place, or had a hurricane suddenly hurled him into it, I can understand the plaintiff's argument as to voluntary exposure.

If a man be seen apparently driving his horse and waggon into the lake towards deep water, on a dark night, or attempting, without any apparent necessity, to ford a dangerous river, I cannot see why he must not be held to have voluntarily exposed himself.

His acts in either case bear but one construction, viz., the simple conclusion that every rational man must draw from them. Or, if the company contract not to be responsible for accidental death while the deceased was intoxicated, and the only witness called by plaintiff swore that he saw the accident and deceased was then helplessly drunk, what would there be to leave to a jury?

If there be some unsuspected and barely possible explanation of such conduct, it surely cannot be reasonably asked from the defendants. All they need do is claim that the facts in evidence shall, in the absence of such explanation, receive their only reasonable construction.

Unless the plaintiff is entitled to recover merely by shewing that deceased died from outward injuries, and that she is entitled to ignore all the circumstances under which the death occurred, although they prove beyond reasonable doubt the defence urged by defendants, she cannot here recover.

If the motion here had been for a new trial, must not the Court *ex debito justitiæ*, in the ordinary meaning of such words, have set aside a verdict rendered on such evidence?

It has been said that, if so, a nonsuit would have been right.

A number of cases bearing on this are cited in *Deverill v. Grand Trunk R.W. Co.*, 25 U. C. R. 521. See also *Campbell v. Hill*, in the old Court of Appeal, 23 C. P. 473; *Avery v. Bowden* in Error, 6 E. & B. 973, where Lord Tenterden's opinion is cited: If the evidence was such that the jury could only conjecture and not judge, it ought not to go to the jury; the onus is on the party offering the evidence, and if he offered only evidence consistent with either supposition of fact, he was not entitled to have it put to the jury. See *McMahon v. Lennard*, 6 H. L. Cas. 995.

In the present case I see no contradiction of fact, an undisputed statement as to the cause and manner of the death.

Only one conclusion could be drawn, and I hardly see how or why a jury should be asked to surmise or extemporize some theory on which it would be within the bounds of possibility to give a different interpretation to the meaning of events.

When all the witnesses in a case swear to having seen the same object, I hardly think it should be left to a jury to say whether it might not have been an optical delusion.

I agree with the learned Chief Justice below. "If the defendants are not to be protected in a case of this kind, it will be useless for them to attempt to defend themselves in any case or under any circumstances."

How a jury will protect them may be gathered from the verdict in this case

The case comes to the Court on leave reserved to enter a nonsuit, as the learned Judge said, "if the Court should be of opinion on the evidence, there was nothing to submit to the jury."

I see nothing to be left to the jury except a direction that if they believed the evidence offered, in which there was no contradiction, they should find for the defendants. If they disbelieved the whole evidence, then there was no proof one way or the other, and no recovery could be had.

It was urged in appeal that as to the wheel found in the buggy, evidence might be obtained to shew that deceased was either taking it to or from the freight shed, or some other place. The effect of any such proof would I fear not help the plaintiff's case, as it would support the opinion that deceased knowing perfectly well what he was doing, voluntarily exposed himself to the great danger of driving in the dark through this net-work of tracks.

I do not rest upon the clause in the policy as to standing or walking on a railway track. If necessary I should hold that sitting or standing in a vehicle drawn by a walking horse along such track, came within these words.

BURTON, J. A.—The policy sued on is a contract to pay a certain sum of money in the event of death from injuries effected through external violent and accidental means within the intent and meaning of the contract, and the conditions thereunto annexed, which injuries alone shall have occasioned death within ninety days from the happening thereof. The policy itself purports to be subject to a proviso that it shall not extend to any "bodily injury of which there shall be no external and visible sign: nor to any bodily injury happening directly or indirectly in consequence of disease; nor to any death or disability which

may have been caused wholly or in part by bodily infirmities or disease existing prior or subsequent to the date of the contract, or by the taking of poison, or by any surgical operation or medical or mechanical treatment; nor to any case except where the injury is the proximate and sole cause of the disability or death." And in one of the conditions it is again provided that it "shall not extend to any case of death the nature, cause, or manner of which is unknown, or is incapable of direct or positive proof."

These references would seem to be explanatory of and intended more clearly to define what is intended by the previous general words contained in the body of the policy, as constituting the risk which the company are willing to undertake, so that it is clearly incumbent upon the claimant under this policy to prove that the insured met with his death from an injury of which there was an external and visible sign, and that it was the proximate and sole cause of death within the ninety days; failing to do which he or she must be nonsuited.

The exclusion from the risks of death by poison would seem to have been introduced *ex abundanti cautela*, as a death of that nature would scarcely come within the general words defining the risk.

But as I read the policy the plaintiff has to make out such a case as I have spoken of, and should it appear in establishing the proximate cause of death that it was in part attributable to disease or by poison, or by reason of any surgical operation, she has not satisfied the onus of proof.

But the policy contains the following additional conditions: "*And no claim shall be made under this policy when the death or injury may have been caused by duelling, fighting, wrestling, lifting, or by over-exertion, or by suicide (felonious, or otherwise, sane or insane), or by sun-stroke, freezing, or self-inflicted injuries, or by concealed weapons carried by the insured, or when the death or injury may have happened in consequence of war, riot, or invasion, or of riding or driving races, or of voluntary exposure to unnecessary danger, hazard, or perilous adventure, or of viola-*

ting the rules of any company or corporation, or when the death or injury may have happened while the insured was, or in consequence of his having been, under the influence of intoxicating drinks, or while employed in mining, blasting, or wrecking, or in the manufacture, transportation, or use of gunpowder or other explosive substances, or while engaged in or in consequence of any unlawful act."

And to a further stipulation or condition: "That he is required to use all *due diligence for personal safety* and protection, and to notify the secretary of this company immediately, and in writing, of any change from the occupation, profession, or employment under which this insurance is granted. He is insured under classification preferred as indorsed thereon, the same being a part of the contract; and this policy shall be wholly void as to all accidents occurring in any occupation, profession, employment, or exposure not named, incident to, or included in the classification under which he is insured, unless he shall have first procured from this company, or one of its agents, a written permit therefor, and paid the additional premium required. *Standing, riding, or being upon the platforms of moving railway coaches, other than street cars, or riding in any other place not provided for the transportation of passengers, or entering or attempting to enter or leave any public conveyance using steam as motive power while the same is in motion, or standing or walking on a railroad track or bridge, are hazards not contemplated or covered by this contract*; and no sum will be paid for loss of life or disability (in consequence of such exposure) happening to any person other than railway employees, who shall have given notice of such occupation, and paid the fixed premium for such hazards."

The defendants plead that the deceased did not sustain bodily injuries within the intent and meaning of the contract and conditions.

A further plea sets out the condition to which I have last referred, and alleges that the death happened in consequence of the assured having in violation of the condition voluntarily exposed himself to unnecessary danger and hazard, in placing himself in the way of a locomotive on one of the railway tracks of the Northern Railway.

The 5th and 7th pleas are directed to a violation of

the condition in consequence of his having violated a rule of the Northern Railway Company forbidding people to walk or drive on any of the tracks of the company.

The 8th plea alleges that the deceased, in violation of the condition above quoted, did not use all due diligence for his personal protection and safety.

The 9th, that he received the injuries which resulted in his death while he was standing or walking on the railroad track, and he thereby incurred a hazard not contemplated or covered by the contract.

There was no evidence to sustain this plea. Under the first plea it would be incumbent on the claimant, in my view, as I have already intimated, to prove the date and cause of death, that it was the result of an accident, that the body bore external signs of the injury; and then she might safely close her case.

But was it necessary for the plaintiff to go further, and allege and prove as part of her case that the assured did not voluntarily expose himself to unnecessary danger, or that he did not violate a regulation of a particular railway company?

So to hold would be to impose upon the plaintiff the burthen of proving negatively that the deceased did not voluntarily expose himself to unnecessary danger, and was not at the time of the accident engaged in any unlawful act; and as a consequence it would have been the duty of the Judge at the trial to hold that the plaintiff had given no evidence fit to be considered by the jury in discharge of that burthen.

That is not the way in which the defendants looked at the case, for they have evidently not considered that these matters were in issue under the first plea, but have raised them as separate and distinct defences, and issues have been joined upon them, and separate questions raised for the jury; the onus of proof in respect of the first plea being on the plaintiff, and in respect of the others, unless I am mistaken as to what is in issue on the first plea, on the defendants.

In declaring that the policy shall not *extend* to the various things set forth in the proviso and condition under those headings, it was not intended to alter or abridge in any way the risk referred to in the earlier part of the policy, but simply to attempt a more accurate definition, so as to exclude certain injuries which might possibly, if the question were left open, be regarded by some people as coming under the head of an accidental bodily injury within the meaning of the contract.

But whilst the policy may *prima facie* extend to injuries resulting in death, where the body itself exhibits the external and visible signs of such injuries, the company stipulate that no claim shall be made if it be shewn that they were caused by duelling, fighting, wrestling or suicide, or in consequence of war, or invasion, or whilst the party insured was intoxicated, or whilst engaged in an unlawful act, and the other instances referred to.

It would, however, be unreasonable to expect the claimant to be prepared to prove, and if necessary to prove it would of course be proper for her to allege, that the death was not caused by any of these matters.

The form of expression used is: no claim shall be made. The usual form adopted is, that the policy shall be null and void if the assured shall die whilst so engaged; but is there any material distinction, when considering the burthen of proof, between the two expressions? In neither case is the company to be liable; but upon whom does the onus of proof devolve?

In the case of *Cluff v. The Mutual Benefit Ins. Co.*, 1 Big. 208, the defendant sought to avoid the contract on the ground that a condition of the policy had been violated. The Court there held that the burden of proof was upon the company notwithstanding the evidence tending to prove a forfeiture came from the plaintiffs' own witnesses; the case could not be withdrawn from the jury or a verdict for the defendants directed, because the defence rested upon an affirmative proposition which the company were bound to maintain.

Among the matters there which were to work a forfeiture was death resulting from the known violation of any law of any country where the assured might be residing, and it was held that they must be construed to refer to a voluntary criminal act known by the assured at the time to be a crime, and not to mere trespasses against property or other infringement of civil laws, to which no criminal consequences were attached.

I think, therefore, that the onus was upon the defendants to establish these defences, the plaintiff having made out a *prima facie* case which, if there had been no other evidence offered, would have entitled her to a verdict.

If I am right in this, it is clear that there could not be a nonsuit. Then was it possible for the Judge upon the whole evidence to direct the jury to find for the defendants?

Looking at the nature of the issue, the affirmative of which it was incumbent on the defendants to establish, I should have thought a more pertinent inquiry would have been, was there any evidence to go to the jury in support of it, that issue being not whether the place where the accident occurred was a dangerous place and one where the deceased had no right to be, but whether he was voluntarily there.

The evidence to sustain that affirmative is very weak as the case now stands.

If it had been shewn that the deceased made any reply to the witness Williams when he gave a warning to him, shewing clearly that he understood what he said, the case would have been much stronger. Consistently with the evidence, the deceased may not have heard or understood the warning, and there is nothing to shew, that between that warning; and the accident the horse may not have become unmanageable; and so in spite of the deceased's efforts, have placed him in a position of danger, or that the deceased may not have been seized with a sudden illness. Numerous cases may be supposed quite inconsistent with its being the voluntary act of the deceased. If it was, as I think it was, the duty of the defendants to make out

that the deceased voluntarily exposed himself to unnecessary danger, the jurors and not the judge were the proper parties to deal with it.

Perhaps when a man is found at that late hour in the evening in so dangerous a place, it would require no very large amount of evidence to satisfy them that he was there voluntarily, but whether there was much or little, so long as there was, in the opinion of the Judge, any, it was the province of the jury to decide upon it. If there was none, the defence failed, and the jury being so told, should have found a verdict for the plaintiff.

Upon the other issues I think that whatever construction is to be placed on the words "unlawful act," there was evidence that parties were allowed to use the yard in the way the deceased did without objection.

I agree with the learned Chief Justice of the Common Pleas, that this has the appearance of a case which the company were warranted in defending, and "that they are entitled to be protected;" but then if it turns upon a question of fact, it is on the protection of the jury they must rely. The mere circumstance that we may fancy that there is a strong preponderance of evidence in favour of the defendants, would not convert an issue of fact into an issue of law. For my own part I think the evidence to sustain the most material part of the issue, viz., that the deceased voluntarily placed himself in that position of danger, is not so strong as one would expect to find it.

If the Court below had not thought themselves justified in entering a nonsuit they would, as I gather from Mr. Justice Galt's remarks, have granted a new trial on the weight of evidence.

Whilst for the reasons I have mentioned I think a nonsuit could not be properly granted, I have no desire to set up my own impressions of that evidence in opposition to those of the learned Judges of the Court below, and entertaining a strong opinion that the facts have not been fully elicited, concur with my brother Patterson in thinking that a new trial should be granted, with costs to abide the event.

I have not referred to that portion of one of the conditions which provides for "standing or walking on a railroad track or bridge not being hazards contemplated or covered by the contract," because it is manifestly aimed at a practice very common on this continent among pedestrians of using the railway track as a highway, and not to a case of this nature.

Hedged in as this contract is by the provision which I have already discussed, which provides that no claim shall be made where the death is caused in consequence of voluntary exposure to unnecessary danger, the provision was probably quite unnecessary, and occurring as it does as a sort of *nota bene* at the end of the condition it may I think be regarded more in the nature of a warning to the holder of the policy, that such use of the highway if it resulted in injuries would disentitle him to any claim under the policy. I see no reason for extending the meaning of those words beyond their plain, ordinary, and popular sense; but I think it might lead to very serious results if the construction placed upon them in the judgment prepared by my Brother Cameron were to prevail.

In this country, where the railways so almost universally cross the highways on a level, that would be a strange construction to place upon these words, which would deprive a policy holder travelling upon the public highway of any claim upon the company, if he happened without any fault on his part to be killed by a passing railway train upon the track, and yet if the words are to be read as "being" on the track, such would be the result, a result which could never have been in the contemplation of the parties.

I think that the plaintiff should have the costs of the appeal.

PATTERSON, J. A.—The jury having found for the plaintiff, and the Court having set that verdict aside and entered a nonsuit—a proceeding of which the appellant complains—

it is necessary to examine the contract carefully for the purpose, amongst others, of ascertaining on which side lay the burden of proof in relation to the matters relied on for the defence.

By the policy, the company undertakes to pay when death or disability is occasioned by "injuries effected through external, violent, and accidental means, within the intent and meaning of this contract and the conditions hereunto annexed." It is obviously the plaintiff's duty to shew that death was so occasioned. But disputes are possible as to whether the means of death, in any particular case, come within the definition. The word "accidental," in particular, is capable of a wide application. The company therefore wisely attempts to restrict this latitude by declaring, in that part of the policy set out in the fourth plea, that "*this insurance shall not extend to*" certain things, all of which touch the immediate and direct cause of death. They are (1) any bodily injury of which there shall be no external and visible sign; (2) any bodily injury happening in consequence of disease; (3) death or disability caused wholly or in part by bodily infirmities or disease existing prior or subsequent to the date of this contract; (4), or by the taking of poison; (5) or by any surgical operation or medical or mechanical treatment; (6) or to any case except where the injury is the proximate and sole cause of the disability or death. It is also declared, in the same form of words, but not in immediate sequence to what I have quoted, that "*this insurance shall not be held to extend to* disappearances, nor to any case of death or disability, the nature, cause, or manner of which is unknown, or incapable of direct and positive proof." These very sensible and reasonable provisions are simply explanatory of what is meant or not meant by external, violent and accidental means. The claimant under a policy has necessarily to prove the cause of the death or disability. If the cause is one of those enumerated, or if it is incapable of direct proof, the claim has not been established. Thus, the negativing of these *quasi excepted* events is involved in the plaintiff's

proof that the event on which he founds his claim is the event covered by the company's undertaking. So far the onus of proof is on the plaintiff. In this case the cause of death was clearly shewn; and, within the definition, it was external, violent, and accidental.

But the policy contains two other stipulations cognate to each other, one of them being inserted between the two which I have noticed, and the other in one of the conditions. They are distinguished from the definitions in two respects. They relate, not to the immediate injury which has caused the death or disability, but to more remote causes which may have induced or led up to it; and they are put, as I take the intention to be, as grounds on which the company may resist a claim in respect of an injury *prima facie* within the contract. The first declares that "*no claim shall be made under this policy when the death or injury may have been caused by duelling, fighting, wrestling, lifting, or by over exertion, or by suicide, or by sunstroke, freezing, or self inflicted injuries, or by concealed weapons carried by the insured, or when the death or injury may have happened in consequence of war, riot, or invasion, or of riding or driving races, or of voluntary exposure to unnecessary danger, hazard, or perilous adventure, or of violating the rules of any company, or corporation, or when the death or injury may have happened while the insured was, or in consequence of his having been under the influence of intoxicating drinks, or while employed in mining, blasting, or wrecking, or in the manufacture, transportation, or use of gunpowder, or other explosive substances, or while engaged in or in consequence of any unlawful act.*"

In this classification it is possible that the items "sunstroke and freezing," and perhaps also "suicide," which seem properly proximate causes of disability or death, may be out of place; but the class is, nevertheless, what I have pointed out. Looking at it in this light, and bearing in mind that the facts or circumstances composing it are accessible to the company, and not necessarily within the knowledge of the assured or his representatives alone, and giving its proper effect to the use of the different form of

expression, (*no claim shall be made, &c.*) as adopted to express something different from the other phrase, (*this insurance shall not extend to, &c.*) I think the matters enumerated in it are and are intended to be matters of defence to be pleaded and proved by the company, and not to be negatived as part of a plaintiff's case. They have been so treated on this record, if one may venture so to say under our present system of pleading. I have italicized those which are relied on in the pleas.

The cognate condition states that certain things, including *standing or walking on a railroad track or bridge*, are hazards not contemplated or covered by this contract; and *no sum will be paid* for loss of life or disability in consequence of such exposure, except in circumstances not now in question. The ninth plea seems to have been suggested to the pleader by this condition, but it does not really set up any defence under it. That plea merely alleges that at the time when the deceased received the injuries which resulted in his death he was standing or walking on a railroad track. It does not aver that he lost his life *in consequence of that exposure*, which is the event that, according to the condition, disentitles the claimants to payment. There was no question left to the jury under this plea. If an issue had been properly raised by it, it would, in my opinion, have been one of fact for the jury. As the matter stands, we are not required to construe the condition. We have not to say whether it prohibits more than the making use of the railway track or railway bridge in place of the public highway, as is sometimes done by foot passengers; or whether it means that no responsibility is to attach to the company for any injury which happens to be sustained upon a railway track or bridge, without reference to how, or by what accident or mischance the insured happened to be there. The plea, as it stands, might be pleaded as a defence in a case where a person walking across a railway track, in the line of a highway which crossed the railway on a level, happened while on the track, to be hit by a bullet fired by some

careless sportsman. But suppose, in a case of that kind, the condition had been properly pleaded, and that the issue was whether the injury was *in consequence of the exposure*, the question would be one of fact not of law, and therefore for the jury; and so it must be when the injury is caused by a locomotive.

There is still another provision on which a plea is founded. The same condition declares that "the party insured is *required to use all due diligence for personal safety and protection*, and to notify the secretary of the company immediately, and in writing, of any change from the occupation, profession, or employment, under which this insurance is granted." I am not prepared to say what is the consequence of neglecting these requirements. The condition itself does not attach any. It is true, the policy is said, in the body of it, to be issued subject to the conditions, but I take it that we must look at the conditions themselves to see what effect they have. Looking at condition number one, we read the words I have just quoted. We then have a reference to a classification of occupations, &c. and a declaration that the policy "shall be wholly void as to all accidents occurring in any occupation, &c., not named, incident to, or included in the classification under which he is insured, unless," &c., and then follows what I have just dealt with as the cognate condition. These three declarations make up condition number one. We have penal consequences expressly attached to two of them. I do not think we can attach any such consequence by implication to the other. *Expressio unius est exclusio alterius*. But if a defence can be founded on the neglect to use diligence for personal safety, it is clearly one in which the issue is on the defendants.

At the trial the learned Judge treated the issues as I have done, in leaving the case to the jury. He asked them to find upon three questions: *First*, Did Mr. Neill voluntarily expose himself to unnecessary danger, hazard or perilous adventure? *Second*, Was he killed while engaged in or in consequence of any unlawful act? *Third*, Did he use due diligence for his personal safety and protection? The

jury found for the plaintiff. The Common Pleas Divisional Court disapproved of that finding, but instead of granting a new trial entered a nonsuit. If I am right in my view as to the burden of the proof, a nonsuit was improper. If no evidence had been given on the three issues which went to the jury, the plaintiff should have recovered, because she had proved the death from external, violent, and accidental means within the definition I have discussed. If evidence were given, as undoubtedly it was given, by the defendants in support of the issues, that evidence had to be dealt with by the jury. The Court could not assume the functions of the jury, however conclusively the evidence may have seemed to prove the fact and however unavoidable may have seemed the conclusion necessary to be drawn from them. The conclusions were conclusions of fact and not of law. The rule cannot be put more distinctly or more forcibly than as found in several of the judgments delivered in the House of Lords in *Slattery v. Dublin & Wicklow Railway Co.*, L. R. 3 App. Cas. 1155. I refer particularly to the language of Lord Cairns, at p. 116 of Lord Penzance, at p. 1181; of Lord O'Hagan, at pp. 1185-6, which is particularly emphatic; of Lord Selborne, at p. 1190, and of Lord Gordon, at p. 1217. The noble lords who dissented, viz., Lords Hatherley, Coleridge, and Blackburn, did so, as I understand their judgments, upon the application of the rule to the question of negligence and contributory negligence, as raised in that case, and not from any difference of opinion as to the general rule.

We do not escape from the rule by the circumstance that all the evidence is one way, or that the inference of fact necessary to sustain an issue strikes us as perfectly obvious. In this case one witness declares that he spoke warning words to the deceased. The same or another witness says the deceased appeared to have perfect control of his horse. Take these statements as illustrations. No one contradicts either statement by opposing testimony as to the facts; but the jury may disbelieve both witnesses, or may, in one case, not be satisfied that the warning words reached

the ears of the deceased; and in the other, may doubt the accuracy of the witness's observation; and in either case may not deduce the inferences to which the evidence is intended to lead.

I think the Divisional Court should have expressed its disapproval of the verdict by ordering a new trial, and not by entering a nonsuit; and that we should, in that respect, vary the form of the order. That being my opinion, I prefer to say nothing upon the merits, or as to the impression made upon my mind by the evidence.

I think the plaintiff should have her costs of the appeal, and that the costs of the day and of the motion for a new trial should abide the event.

CAMERON, J.—I am of opinion the judgment of the Court of Common Pleas was right, and should be affirmed. On the evidence the deceased John Neill did not come to his death by bodily injury effected through external, violent, and accidental means within the intent and meaning of the contract entered into by the defendants, and the conditions thereto annexed. The plaintiff in her declaration has averred that he did, and the defendants have denied it. Treated as a question of the burden of proof, the affirmative is upon the plaintiff, and she was bound to shew not merely a death from external violence, but death by such violence at a place and manner insured against.

By the first condition on the policy it is expressly declared, among other risks, that "standing or walking on a railroad track or bridge, is a hazard not contemplated or covered by this contract, and no sum will be paid for loss of life or disability in consequence of such exposure."

From the evidence adduced in support of her case by the plaintiff, it appeared that the deceased was driving along the track of the Northern Railway for some distance just before the accident causing his death happened, and the buggy in which he was sitting was on the track when struck by a railway train; but whether it was then in motion or stationery, does not appear.

There is no conflict of testimony on this point. At the place where the accident happened, no one not an employee of the company had a right to be. Unless therefore he can be said not to have been standing or walking on the railroad track, by reason of his having been sitting in a buggy, he was killed under circumstances not included in the risk taken by the defendants, and there was no question of fact to be left to the jury; nothing from which a jury could or might draw the inference that he was killed outside of the circumstances pointed out in the first condition as exempting the defendants from liability; and the plaintiff having failed to bring the death within the risk covered by the policy, was properly nonsuited. Assume, for the purpose of testing the correctness of this position, that the contract of the defendants had been to pay the plaintiff the sum of \$5,000, upon proof that deceased had sustained bodily injuries effected through external, violent and accidental means, causing his death, subject to the condition that injuries sustained anywhere except in the city of Toronto were hazards not contemplated or covered by the contract, and the plaintiff's case disclosed the fact that the injuries resulting in death were inflicted in the township of York, outside of the city of Toronto, could it be contended with any show of reason that the plaintiff had not failed to make out a case for the jury? If it could not, where is the distinction upon principle between the supposed case and the one under consideration on this appeal? I am unable to find any room or place for a distinction. Then the question presents itself, was the deceased standing or walking on a railroad track within the meaning of those words as used in the first condition on the policy? He certainly was not standing or walking, if those words are to be confined in their interpretation to the position of a person when on his feet upright, as distinguished from sitting or lying down, or to his movement when walking as distinguished from running, jumping, or creeping.

The meaning of "standing," as used in the condition, in

my opinion, is the same as "being on," and would extend to the case of a person lying down upon the track, or sitting or standing upon anything placed on the track, elevating him above the track, otherwise than as a passenger or being stationary in or moved by a car or carriage under the control and management of the railway authorities. "Walking" would not be confined to moving in an upright position, but would cover creeping or going upon the hands or knees, or moving in any other way than being conveyed by the railway authorities in their cars. The words must, I think, clearly have been, in the contemplation of the parties, intended to include or extend to being on a railway track in a condition of rest or motion other than being thereon in the ordinary way in which a railway is lawfully used by the public, and were intended to prohibit, by excluding liability therefor, the very thing the deceased did in the present case. In *Pearson v. The Commercial Union Assurance Co.*, 15 C. B. N. S. 304, it was held an insurance against fire on the hull of the steamship *Indian Empire lying in the Victoria Docks, London, with liberty to go into dry dock and light the boiler fires once or twice during the currency of the policy*, did not extend to a loss by fire happening while the vessel was anchored in the Thames, after coming out of a dry dock, to have further repairs made while so anchored; and that the policy would only cover a loss accruing while in the London docks or in a dry dock, or during the time reasonably required in the removal from the one to the other. A nonsuit was directed by the Court to be entered.

I am further of opinion, it appearing from the evidence that the horse deceased was driving was fully under control, *prima facie* he voluntarily went into a dangerous place—that is, a place that any one of ordinary intelligence would know to be dangerous—and so voluntarily exposed himself to unnecessary danger and hazard within the terms of the policy. In the absence of evidence to shew the *prima facie* presumption from the evidence of voluntary action was wrong, the nonsuit was right on this

ground also. There was no evidence to shew the place was not dangerous; none to shew that the deceased was not acting voluntarily; and nothing from which the Court or Judge could properly leave it to the jury to draw the conclusion that the deceased was not acting voluntarily.

The appeal should, in my opinion, be dismissed, with costs.

The Court being equally divided, the judgment of the Court below was affirmed, with costs.

ADAMSON V. ADAMSON.

Grant, construction of—Statute of Limitations.

Two several lots were conveyed by the deed in trust set out below to C. and A. respectively to the use of G. and A., their heirs and assigns, as joint tenants and not as tenants in common.

Held, that under the provisions of such deed, the grantees took the respective lots in severalty.

Held, also, (affirming the judgment of Spragge, C., 28 Gr. 221,) upon the facts there stated, that the tenant of an equitable tenant for life, in setting up the Statute of Limitations against the equitable remainderman, could not be allowed to compute the time during which he had been in possession prior to the death of the tenant for life.

Per BURTON, J. A.—The owner of an equitable estate cannot, notwithstanding the Judicature Act, proceed against a trespasser in his own name. He is still bound to sue in the name of his trustee.

The provisions of the Statute of Limitations as regards equitable estates considered.

Per PATTERSON, J. A.—Under the circumstances appearing in this case the plaintiff was entitled to recover in respect of the equitable estate.

THIS was an appeal by the defendant from a decree of the Court of Chancery pronounced by Spragge, C., on the 15th of February, 1878, and reported 28 Gr. 221, where, and in the present judgment, the questions involved in the suit sufficiently appear.

The appeal came on to be argued on the 11th November, 1881.*

Bethune, Q. C., and *Moss, Q. C.*, for the appellant. The issues and questions raised in the present suit materially differ from those involved in the former cause between the same parties, and therefore the depositions and notes of evidence taken therein should not have been received by the Court on the hearing of this; and the title of the plaintiff in the suit, if he had ever acquired one, was barred by the Statute of Limitations, and no tenancy was shewn to have ever existed between Ellen Adamson and Charles Adamson, mentioned in the proceedings.

They also insisted that the matter had been finally disposed of in the former suit of *Adamson v. Adamson*, and that the learned Chancellor erred in refusing permission at the hearing to raise that point by supplemental answer.

* *Present*.—HAGARTY, C. J., BURTON, PATTERSON, and MORRISON, JJ. A.

The *Attorney-General* and *MacIennan*, Q. C., for the respondents. The objection of *res judicata* was not open to the appellant as that defence was not set up by her answer; and if it had been, clearly it would not have availed her, as it is plain from the whole course of the proceedings that the matters now in question could not be looked upon as *res judicata*. They also contended that the learned Chancellor was right in receiving the evidence taken in the former suit between these parties, the issues in that in all material points having been identical with those in the present case; that evidence fully proved title in the plaintiff to recover the land in question, the contents of the lost trust deed having been sufficiently established by that evidence; and it also shewed that the claim of the plaintiff was not barred by the Statute of Limitations, a tenancy between Ellen Adamson and Charles Adamson, having been clearly proved. In addition to the cases mentioned in the judgment: *Jones v. Phipps*, L. R. 3 Q. B. 567; *Peterkin v. McFarlane*, 4 A. R. 25; *Attorney General v. Magdalen College*, 18 Beav. 223; *Butler v. Carter*, L. R. 5 Eq. 276; *Foley v. Burnell*, 1 Br. C. C. 274; *Truesdale v. Cook*, 18 Gr. 532; *Merritt v. Shaw*, 15 Gr. 321; *Morgan v. Morgan*, L. R. 10 Eq. 99; *Mills v. Capel*, L. R. 20 Eq. 692; *Burroughs v. McCreight*, 1 J. & Lat. 290; *Hovenden v. Lord Annesley*, 2 Sch. & L. 607; *Pentland v. Stokes*, 2 B. & B. 68; *Thompson v. Simpson*, 1 Dr. & W. 459, were referred to.

September, 23, 1882. PATTERSON, J. A.—The plaintiff, Alfred Adamson, brings this action to recover from Mary D. Adamson, widow of his brother Charles, the possession of lot number two in the second range in the Credit Indian Reserve. He sets up a paper title. The defendant puts him to the proof of it, and claims also under the Statute of Limitations. I shall deal in the first place with the title made by the plaintiff.

The plaintiff's father, Joseph Adamson, was seized in fee of lots one and two, besides other lands. By deeds of lease

and release, dated the 8th of August, 1837, he conveyed to the Honourable Peter Adamson and James Coleman four parcels of land, two of which were these lots one and two, upon trusts declared in the deed of release. This deed is by no means well drawn, and the meaning is not always plain.

The whole of the lands were to be held to the use of Ellen Adamson, Joseph's wife, for her life ; then in trust for Joseph's children as specified. *Primo*—200 acres in the township of Trafalgar were to be held to the use of James Adamson, the settlor's eldest son, with limitation over, in the event of his dying under age or not having heirs of his body, to the use of George, Alfred, and Mary, his brothers and sister, their heirs and assigns, as tenants in common. "*Secundo*—Upon further trust to hold the lands and premises situated in the township of Toronto, being lot number two, with the appurtenances, to the said George Adamson : And also lot number one, situated in said township, to the said Alfred Adamson, * * to the use of them, their heirs and assigns, as joint tenants, and not as tenants in common." *Tertio*—relates to a parcel of seventy acres, which is to be held to the use of Mary, "till she arrive at majority or be married, whichever of these events shall first happen, for and during the term of her natural life ; and in the event of her marrying, with remainder thereof for life to her husband after her death, so long as he continues unmarried ; remainder to the heirs of the said Mary's body, lawfully begotten, and on failure of such issue, then to her brothers, the said George and Alfred, then surviving, to be held and enjoyed by them, their heirs and assigns, as joint tenants, and not as tenants in common." "*Quarto*—and also upon trust that in case the said James, George, Alfred, or Mary Adamson, or any of them, die before the age of majority, without having lawful issue as aforesaid, the share of such deceased shall descend and accrue to the survivors or survivor and their heirs, excepting as hereinbefore specially mentioned and provided. And lastly, upon trust that the said trustees, or

the survivor of them, shall well and sufficiently convey and assure absolutely in fee to the said parties respectively at the times and in the manner hereinbefore mentioned, their heirs and assigns, in the several lands and premises freed and discharged of and from all manner of trusts and incumbrance whatsoever, excepting those particularly before recited."

Ellen Adamson, Joseph's widow, died in 1875. George had died twenty years earlier, at the age of twenty-eight. I suppose he died unmarried and intestate, but I do not think it is mentioned in the evidence how that was.

The plaintiff brings this action to recover the whole of lot two, on the assumption that, under the settlement of 1837, he was in equity joint tenant with George in remainder, and after George's death sole remainderman, expectant on the death of his mother.

It is not conceded on the part of the defendant that the plaintiff held as joint tenant with George; and a question is thus raised which the very inartificial structure of the deed makes one of some nicety.

From the extracts I have read, it is apparent that the deed was drawn by some one whose skill was inferior to his boldness in the use of the language of conveyancers.

This being a deed and not a will, we are bound to construe the limitations according to the force of the terms in which they are declared; but if we had to construe in a will the same language which we find here, and were therefore more at liberty to deduce the intention without closely scanning the terms employed, it strikes me that there would still be difficulties, having regard to the limitations as a whole, in concluding that it was intended to create, between George and Alfred the right of survivorship, which is an ordinary incident of joint tenancy. The idea which I should gather would be that the technical expression was used without a distinct appreciation of its force.

The limitation over of James's share to the other three, as tenants in common, is to the same effect as the general

limitation over in the clause *quarto*, which was therefore surplusage as to that part of the property. The oddly expressed limitation to Mary "till she arrive at majority or be married, for and during her natural life," coupled with the remainder to the heirs of her body, I suppose gives her an estate tail. "On failure of issue" the limitation is to George and Alfred, "then surviving," their heirs and assigns, as joint tenants, and not as tenants in common. It may yet puzzle some one to say where Mary's estate goes when the heirs of her body fail. We are not concerned about that. What I call attention to is the inconsistency between the limitation over, upon indefinite failure of issue, to two of the brothers as joint tenants, and the effect of "*quarto*," under which, if the failure occurs while Mary is under age, her *three* brothers take, and take as tenants in common. These eccentricities do not touch the land now in question; but they shew that the looseness of conception, as well as of expression, is not peculiar to the clause *secundo*, which is the one we have to construe. Under this clause the trust is to hold lot two to George, and lot one to Alfred, to the use of them their heirs and assigns. If this had been all, there would have been no difficulty in reading the limitation as giving lot two to George, his heirs and assigns, and lot one to Alfred, his heirs and assigns. The question is, what force is there in the added words, "as joint tenants, and not as tenants in common." Do they give each brother an interest in the lot expressly designated for the other, so as to make them joint tenants of both lots? If it were our duty to search for the meaning of the settlor outside of the terms used in the disposition of these particular lands, as it might be if this were a will and not a deed, the clause *quarto* might, as I have said, create a doubt of the intention to make the brothers joint tenants, notwithstanding the use of the technical term. That clause treats the two lots as the property of Alfred and George respectively, just as it treats James's share as belonging to him, and Mary's as belonging to her; and in the event of either of them dying

under age, and without issue, gives his lot to the other three, and does that by a limitation, which, in 1837, created a tenancy in common.

I have not been able to convince myself that the phrase "as joint tenants, and not as tenants in common," in this clause *secundo*, can be treated as having any force, although I have bestowed a good deal of consideration upon the subject, and have sought for assistance in many of our older authorities, as well as in books of more recent date.

A conveyance of one parcel of land to A, and another parcel to B, *as joint tenants*, seems to me unintelligible or contradictory.

If a joint estate were conveyed, the phrase would be of service in defining the nature of the tenure intended; but when the conveyance is to each severally of his own parcel the words are repugnant, and not explanatory.

If they are to be regarded as analogous to the *habendum* in an ordinary grant, or to such an explanatory description as may be introduced by *videlicet*, or that is to say—and I think they may properly be so regarded—there will be found plenty of authority for treating them as inoperative. There is a note, at p. 75 of *Sheppard's Touchstone*, by Preston, to this effect: "One who is not named in the premises may, nevertheless, take an estate in remainder by limitation in the *habendum*. 2 Roll. Abr. 68, Hob. 313. In 3 Leon. Ca. 60, it is said that the *habendum* shall never introduce one who is a stranger to the premises to take as grantee, but he may take by way of remainder. See more amply in Vin. Abr. Faits (Ca.)" One of the illustrations found in *Comyn's Dig.* (Estates K.) is the converse of this case. Under the heading "Joint tenants—who are"—there is this note: "So, though there be a severance by the *habendum*; for that will be repugnant: as, if two acres be granted to A. and B., *habendum*, the one to A. and the other to B."

The case of *Doe v. Steel*, 4 Q. B. 663, is a modern instance of the rejection of part of a *habendum*.

"The use of (*viz.*) or (*Sc.*) or in English, (that is to say),

and the nature and force of it," are discussed at some length in Hobart, at pp. 171 and 172. I may make a few short extracts :

"And, therefore, it is a kind of interpreter ; her natural and proper use is to particularize that that is before general, or distribute that that is in gross, or to explain that that is doubtful and obscure. First, it must not be contrary to the premises. * * Next, it must neither increase or diminish, for it is not the nature of it to give of itself. * * If A. grants twenty shillings rent in his manor, viz., by the hands of one so much, and of another so much ; and the tenants assigned are but tenants at will, the whole manor is charged, for the viz., being of no effect, is void in law : for itself being of no effect, cannot frustrate the premises, which are of sufficiency of themselves : 8 E. 3, 59. One gave land to A. and B. *habendum* to A. for life, and after his decease to B. This was holden good. So Littleton 66. If a man give land to two, *habendum* to them, Sc., the one moiety to the one, and the other moiety to the other, it is good. For, note that the substance of the premises is not altered, for both of them have the whole in use, in common, as they should have had it by the premises jointly, which is but a point of quality or accident altered. But if it were twenty to two, Sc. ten to one and ten to another, it were void."

The limitations we are considering are of equitable estates, and not legal, but that I do not understand to affect the rules of construction to be applied to the instrument. See *Fearne* on Con. Rem. 142, &c.

It is therefore my opinion that George Adamson died seized of the equitable remainder in fee in the land now in question, viz., lot number two, in severalty.

I assume, as nothing appears to the contrary, that in 1855, when George died, all the other four, viz., James, Alfred, Mary, and Charles were alive. Their father died before George.

Alfred would therefore inherit, as one of the heirs of George, an undivided fourth part of lot two.

He has acquired the legal estate from the trustees of the settlement ; and, therefore, if I am right in my construction of the deed, he brings this action on his own behalf as to one-fourth, and on behalf of the other heirs of George as to three-fourths of the beneficial interest.

I proceed now to consider the defence under the Statute of Limitations.

The material facts are, that Charles Adamson was let into possession by his mother, the equitable tenant for life, in 1863, as her tenant. He died in December, 1863, and his widow, the present defendant, has remained in possession ever since. She has paid no rent. There has been no lease or acknowledgment in writing. Her mother-in-law did not content herself with tacitly acquiescing in her retaining possession. She expressly informed her, shortly after her husband's death, that the place belonged to her, the mother-in-law, but she never exacted rent or interfered with the defendant's occupation of the place ; and on the other hand, there is no pretence that the defendant ever denied her mother-in-law's right, or asserted any title to the possession, except her permission. I read a few words from the defendant's deposition: "She called it her property, but she said her son was to have it ; it was in his lifetime that she said that ; I never inquired into the business ; I can't say whether it was from his mother that he got the place or not ; I can't tell anything about that ; I suppose it was through his mother that he got it ; she allowed him to go on the place ; she never tried to get the place back from me ; she said it was her place ; she told me that just after my husband died ; I don't recollect that she told me that afterwards."

There was thus, as I apprehend, a tenancy at will created between the two ladies, which was never determined, but existed until the death of Mrs. Adamson, senior, in 1875. Under the law now found in subsection 7 of R. S. O., ch. 8, sec. 5, the tenancy at will would be deemed to have determined about the beginning of 1865. This would be, however, only for the purposes of the Act,

because it never was in fact determined during the lifetime of Mrs. Adamson. As against Mrs. Adamson, senior, if it had become necessary to compute the length of possession by the defendant, for the purpose of the Act, the starting point would doubtless have been at the expiration of one year from the commencement of the tenancy, or about the beginning of 1865. She might, of course, have determined her will at any time, and ejected the defendant. The circumstance that her title was equitable only would not have affected her right against her tenant, who was estopped from disputing her right to possession.

The statute would not have interfered with her right of action, because, until a later date than 1865, the period of limitation was twenty years. But the tenancy at will was not determined by either lessor or lessee. The trustee could not have determined it. The defendant was not *his* tenant. The trusts were completely executed trusts. The tenant for life had as against the trustee an absolute right to the possession, and her right to transfer that possession to a tenant either for years, or for her own life, or at will, could not be disputed by the trustee. Those rights would, if necessary, have been enforced by a Court of Equity, and could have been effectually asserted by the defendant, if the trustee had attempted to disturb her possession. Something of this sort formed the subject of *Allen v. Walker*, L. R. 5 Ex. 187. The plaintiff in that action, in whom the legal estate in land was vested, but who was trustee for his wife, to her separate use, declared against the defendant for trespass to the land, conversion of the crops, and assault. The defendant pleaded his title as tenant of the wife, and justified the assault as committed in resisting the plaintiff's entry upon the lands. These were held good equitable pleas.

Now, while a Court of Equity would protect the occupant, who held under the person equitably entitled to possession, from eviction by the trustee under his legal title, it follows as a correlative equity, that that occupation could not be allowed to be set up as a disseisin of the trustee. In *Allen*

v. *Walker*, the tenancy was from year to year, but the law would have been the same if it had been at will, the *cestui que* trust being entitled to dispose of the land as she pleased. Can it be asserted that a Court of Equity could hold that the tenant was justified in resisting by force the trustee's attempt to enter upon the land, and yet permit the tenant to compute against him, for the purpose of making title under the statute, the time during which he so forcibly held possession?

The tenant would be restrained from computing this time on a principle analogous to that acted upon by Sir G. J. Turner, V. C., in *O'Brien v. Osborne*, 10 Hare 92. A debtor had conveyed his life interest in property in trust for creditors, who in consideration thereof agreed not to molest him on account of his debts. After his death his representatives set up the Statute of Limitations as a bar to the claim of a creditor; but the Vice-Chancellor held that the tenor of the deed and the terms of the license to the debtor, precluding any suit against him during his life for payment of the debt, otherwise than in the manner provided by the deed, removed the objection.

The attempt of the defendant to use the statute as a bar to the legal right of entry, and as therefore cutting out the equitable remainderman whose estate has only recently become one in possession, is, by reason of the privity with the tenant for life, made under circumstances for which I have not found a parallel in any case I have met with; and that feature is one which I do not think has been anticipated in any discussions I have read in text books. It serves, I think, to dispose of the case without our necessarily having to resolve whatever doubts may exist as to the effect upon the title of the equitable remainderman of possession held by a trespasser for the statutory period, but during the continuance of the previous particular estate. I am, therefore, of opinion that the plaintiff is entitled to recover upon his legal estate.

But I am also of opinion that, under our law as it stood when this action was brought, viz., in 1878, the plaintiff

had a right to recover in respect of his equitable estate, even if the legal right of entry had been barred ; though it results from the view I have taken of the deed of settlement, that he could only succeed upon that title for his own undivided fourth.

Under the Real Property Limitations Act, R. S. O. ch. 108, sec. 5, sub-sec. 11, the right of entry, in respect of an estate in remainder, shall be deemed to have first accrued at the time at which such estate became an estate in possession. The plaintiff's estate became an estate in possession in 1875. Up to that date the life estate had subsisted. The trusts in respect of both estates were executed trusts. The rights of the *cestuisque trustent* were absolute as against the trustee. No right existed in the plaintiff or in the trustee to interfere with the possession of the tenant for life. If the tenant for life happened to be ousted by a trespasser—and for the purpose of this branch of the case I should, perhaps, assume the plaintiff to have been a trespasser—I do not doubt that the trustee could have brought ejectment and have recovered the possession. If the possession of the trespasser would, if allowed to continue for the statutory period, have barred the legal title and created a title in the trespasser himself as against the equitable as well as the legal estate, I do not perceive any good reason why the equitable remainderman should not have been at liberty to require the trustee to bring ejectment, even during the continuance of the particular estate. But conceding that he had that right, it does not in my judgment touch the question under the statute with which we are just now concerned. The plaintiff comes precisely within the language of sub-sec. 11, if that language applies to equitable as well as legal estates. He never had a right of entry before 1875, and he then acquired one valid against all the world, but enforceable only in equity. The whole beneficial interest in the property was his. The trustee, who held the dry legal estate, had no interest whatever in the property, and never had. By section 29 of the statute, the plaintiff was precluded from claiming any longer time for

bringing an action on his equitable title than if his title had been a legal one, but it is nowhere said that the limitations apply only to legal titles and bar the equitable estate in lands merely because an action at law might have been brought upon the legal title. On the contrary, suits in equity for the recovery of land are expressly mentioned in more than one section of the statute. Thus section 22 speaks of actions at law or suits in equity to recover land claimed under a mortgage; and section 31 regulates suits in equity to recover land of which a person has been deprived by fraud.

The objection is not founded on the words of the statute so much as upon the asserted doctrine that, in actions for the recovery of land, the legal title alone must be relied on. It is urged in effect that ejectment was, under the former jurisdiction of the Courts, necessarily brought in a Court of law, the right to possession being a legal right: that as against a trespasser in possession, with whom the claimant was not in privity, there was no question of equity, the plaintiff had to recover on the strength of his own title proved in a Court of law: and, therefore, the limitation of time applied to a legal right of entry only, and if that was barred the possession could not be disturbed. And it is further argued that such were the respective rights of claimant and party in possession when the jurisdiction of the Court of Chancery was extended by the Administration of Justice Act of 1873, and that they were not affected by that change.

I do not propose to enter into an examination of the authorities bearing upon these propositions, because I am satisfied that I could add nothing of value to what is already well said in *Lewin on Trusts*, as the result of the cases.

In several of the editions of that valuable treatise, issued before the passing of the Judicature Act, 1873, 36 & 37 Vict. ch. 66, the passage to which I allude will be found adapted to the state of the law as it then stood. The fifth edition was issued in 1867. The passage in that edition forms

the 4th section of chapter 23, and will be found at page 480. In 1875 the sixth edition was published, and the same statement of the law was repeated in the 4th section of chapter 25, at page 558, and again at page 579 of the seventh edition, but it was recast, so as to state the law as it had been before the Act, not as it continued to be.

I shall content myself with quoting the concluding portion. "From the time of Lord Mansfield and until the recent Act, it was established: First, that a *cestui que trust* could not recover in ejectment unless a surrender to him of the legal estate could be reasonably presumed, which of course could not be where the circumstance of the outstanding legal estate appeared on the declaration or special case, and the *cestui que trust* had no alternative but to bring his action in the name of the trustee, who was to be indemnified against the costs: Secondly, that the trustee, as the tenant of the legal estate, might recover in ejectment from his own *cestui que trust*; and the *cestui que trust* had no defence to the action at law, but must have had recourse to an injunction in equity, and the clause in the Common Law Procedure Act, 1854, which authorized an equitable defence at law, did not apply to ejectment. However, a lessee under a *feme covert* entitled to her separate use, might protect herself by equitable plea against trespass by the husband in whom the legal estate was vested." To this was added the statement that: "Now generally by 36 & 37 Vict. ch. 66, sec. 24, equitable defences are to be recognised in all the Courts, so that for the time to come the full merits, both at law and in equity, will be administered in the same action."

This explanation of the law may be read as having applied to our Courts ever since the Administration of Justice Act of 1873 came into force. Under the fourth section of that Act the Courts of law entertained equitable defences in ejectment, and under the thirty-first section a person who established his title in the Court of Chancery obtained possession under the process of that Court.

To put the case in the language of the Real Property

Limitations Act, a person entitled to a future estate in land might, as soon as his estate became one in possession, bring his action to recover the land. If his title were equitable, and not legal, he would bring it in the Court of Chancery. Even if it turned out that he had the legal estate, his action would still, under section 32 of the Administration of Justice Act, lie in the Court of Chancery. If in that Court he established his title, whether legal or equitable, the occupant could not invoke the Statute of Limitations, if the action had been brought within the statutory period after the right accrued. That is the one inquiry under the statute; and as the same Court can inquire into the right whether legal or equitable, and can also give possession, the indirect advantage which a trespasser in possession once had by reason of the limited jurisdiction of the Courts no longer exists. That advantage was an accident, so far as the Statute of Limitations was concerned. To the trespasser it could make no difference whether the title, to which he was a stranger, was legal or equitable. "The question," as remarked by Sir T. Plumer, in *Cholmondely v. Clinton*, 2 J. & W. 155, "respects the plaintiff's right to the remedy, not the defendant's title to the estate."

The recent case of *Pugh v. Heath*, L. R. 6 Q. B. Div. 345, 7 App. Cases 235, bears out the position taken by Mr. Lewin. In that case the statute had run in favour of the mortgagor, as against the legal right of entry. It was held in the Court of Appeal and House of Lords, that a new right accrued to the mortgagee from his foreclosure decree, and upon this right he recovered possession. Lord Selborne, L. C., in giving the judgment of the Court of Appeal (6 Q. B. Div. 362) remarked: "It is not in our opinion necessary to determine how far and under what circumstances, before the Judicature Acts, a Court of law would have taken notice of the effect of such orders of foreclosure, as vesting for the first time the equitable title in the person who, previously, as mortgagee had the legal estate. Under secs. 24 and 25 of the Judicature Act of

1873, the High Court of Justice is bound to do so, and to give full effect to the equitable right; so that (if there would previously have been any conflict on this point between law and equity) the rule of equity must now prevail." In the House of Lords, the point is put in a few words, by Lord Blackburn, (7 App. Cas. 239.) "Some twenty years ago," he said, "there might have been some difficulty in this case, in saying whether the proper form of remedy was by ejectment at law or by a suit in Chancery; but now it is quite immaterial which of the two it is, if it can be shewn that there is a remedy; and I perfectly concur in the judgment, for the reasons which have been given by the noble and learned Lord now on the Woolsack, that there is a remedy, in one way or other, and it does not matter which."

I am of opinion that the appeal should be dismissed, with costs.

BURTON, J.—I agree with my brother Patterson in thinking that whether the present plaintiff was entitled in equity to the whole of the lot in question, or merely to a portion as one of the heirs of his deceased brother George, he is entitled in this action to recover the whole lot, having acquired the legal estate from the trustee, to which the Statute of Limitations is no answer, inasmuch as the defendant, upon her own shewing, was tenant-at-will to her mother-in-law, the tenant for life, and until that tenancy was determined by the death of the tenant for life the statute would not begin to run against the trustee. This appears to be sufficient to dispose of this case, and if I agreed in the view which he takes of the *cestui que trust* recovering upon the strength of his equitable title, I should have contented myself with concurring simply; but with the doubts I entertain upon that branch of the case, I think it right to state them as it appears sufficiently involved in difficulty to render some legislation upon the subject desirable.

Even under the Judicature Act, if I rightly understand

the effect of that enactment, no alteration has been made in the rights of any parties, nor in their remedies, except to this extent that they can enforce them now in a Court which is neither a Court of law nor a Court of equity, but in which they are entitled to the same relief which they could have obtained in either of those Courts, but I do not understand that they are now entitled to enforce any remedy which they could not have enforced in either of these Courts previously to its passage.

The proceedings were, however, instituted before the Judicature Act came into operation, and the questions involved have to be decided under the provisions of the Administration of Justice Act of 1873.

It is of course clear that before that Act a party having a mere equitable title could not institute a suit for the actual recovery of the land against a trespasser in possession.

The object of that enactment was to make the Courts of Law and Equity as far as possible auxiliary to each other, and did away with many anomalies previously existing, and enacted, among other things, that in the case of a purely money demand a plaintiff might proceed in a Court of law although his right to recover might be an equitable one only; and it also provided that in an action at law the Court might pronounce such judgment as the equitable rights of the parties required—in other words, if the plaintiff could obtain the relief sought in a Court of equity, he was not to be defeated because he had sought that relief in a Court of law and *e converso*.

In the case in question the plaintiff was, as I think the Vice-Chancellor properly held, not entitled to recover possession upon his equitable title in a Court of equity any more than he would have been so entitled in a Court of law, and he properly dismissed the bill (25 Gr. 550).

The plaintiff appears to have acquiesced in this view of the law, as in place of appealing from the Vice Chancellor's decision he has filed the present bill, in which he relies on the legal title of the trustee, which, after the commencement of the former suit, had been obtained.

The plaintiff's equitable estate became an estate in possession in 1875, and as against his trustee and every one else he became entitled to claim the possession, and if necessary to enforce it against the trustee and any one claiming under the trustee, by a suit in equity; but I can find no authority that he would have any direct equity against a trespasser. Nor do I think the position sound that he could have required the trustee to bring ejectment during the continuance of the particular estate.

It is said that the statute of Wm. IV. speaks of suits in equity to recover the land, and no doubt there are some suits in which the *cestuis que trust* would be the proper parties to sue, as under the 30th section, where the trustee has sold the trust estate to a party with notice, and others may be suggested; but no one supposes that at the time of the passing of that Act he could maintain a suit in his own name against a trespasser in possession, and yet the statute recognized at that time (when the action had necessarily to be brought in the name of the trustee) the title of the equitable owner, and provided that his right to bring a suit should be deemed to have first accrued when his estate or interest became an estate or interest in possession; and he, as well as the owner of a legal estate, was equally barred if the suit was not brought within twenty years, the statute giving referentially, by express enactment, to claimants in equity the same time and with the same saving of disabilities as to claimants at law.

The Legislature were aware that no suit could be brought against a trespasser in possession by the owner of an equitable estate in his own name. What, then, was meant by these provisions? It was not intended that the Act should be a dead letter.

In cases of this nature the individuals named as trustees are only the nominal instruments to carry out the wishes of the real owners. The lapse of the legal estate never has the least influence upon the trusts to which it is subject. The trustee, therefore, is a mere machine, and it would be

sacrificing the substance for the shadow, were we to hold that, although the right of this plaintiff to enjoy the land first accrued only in February, 1875, he should be debarred from recovering because he had not the legal estate, and the person holding the legal estate (as well as the tenant for life for whom he was trustee), had been out of possession for over the statutory period before the institution of of this suit.

We were referred on the argument to the case of *Melling v. Leake*, 16 C. B. 652, but no such question as is here presented did or could arise in that case; the possession had been adverse for over the statutory period to both the *cestui que trust* and the trustee. The trustee held the property in trust to *let and demise the premises*, and *from the rents to pay an annuity to the widow* of the testator, and *the residue to one of the sons* for life, and after his death in trust for sale—there was no one claiming an equitable estate in remainder.

The framer of the Act in question knew also that the equitable owner was the beneficial owner, and dealt with that estate. Is it a very forced construction to hold that the right to bring a suit in such cases as the present, was a right to force the trustee to do his duty by bringing a suit or by bringing a suit in his name?

To my mind the right to put the trustee in motion accrued to him only on the death of the tenant for life; he became then entitled to sue in his name for the recovery of possession; from that time the statute began to run as against him; if not enforced his title would be barred at the end of twenty years, and the person in possession, if desiring to set up his title by prescription, could only take advantage of the statute in its terms; the trustee would be entitled to recover for the benefit of the *cestui que trust*, and before the recent legislation it is quite possible that the only escape from the defence of the Statute of Limitations might have been by bill in equity, but, however, that may be, it must surely have been intended to give to the equitable owner the right in fact, as well as in name

to recover the land during twenty years after the accruer of his title. To hold otherwise, would be to refuse to give any effect to those sections of the Act which deal with equitable estates. To say *uno flatu* that the right of such equitable owner shall be deemed to have first accrued at the time when the same became an estate or interest in possession, and that it was at that time already extinguished by reason of the trustee's title being barred during the term of another equitable owner for whom he was trustee, involves an absurdity, which it would not be complimentary to impute to the language of the Legislature. Whereas, if we regard the enactment as dealing under these sections with the equitable title only, the whole enactment becomes consistent and intelligible.

Thus the title of the tenant for life would in^o July, 1876, had she so long lived, have become extinguished under the state of facts assumed by the defendant, that she was in possession otherwise than in privity with her. The right of the plaintiff to the possession accrued upon her death, and would be barred if not enforced by entry or suit within ten years.

If this be not the correct view of the Act, the state of the law is rather alarming, as I apprehend there can be no doubt that the remainderman could not put the trustee in motion, nor would the trustee be bound or justified in obeying his directions until his estate became an estate in possession. The tenant for life was, until the determination of her estate, entitled to the uncontrolled disposition of it, and so long as she did not commit or suffer waste, it was no affair of any one that she refrained from taking possession to her own prejudice.

The equitable owner is the party entitled to the possession, although he may be forced to use the machinery of the legal estate to obtain it; and as the trustee is bound whenever that equitable estate becomes one in possession to obey his direction, it is not placing a very forced construction on the language of the statute to speak of *him* making an entry or bringing a suit, although he does so by his trustee or agent.

In the case of *The Attorney-General v. The Magdalen College*, 6 H. L. Ca. 189, the *cestuis que trust* might, I think, have filed a bill on their own behalf without the Attorney-General. The trustee had conveyed the legal estate to the purchasers, and the *cestuis que trust* were probably the proper parties to sue, but the Court held that if the Attorney-General was a necessary party, he was only an instrument to enforce the rights of those who were entitled to the benefit of the charity, and stood in the same position as they did with respect to those rights; and if the claimants on whose behalf he was suing were barred, he was also barred. The case has little or no bearing upon the point we are now considering, but I cannot help thinking that as the law stood before the Administration of Justice Act, the Courts were bound to recognize the equitable rights of the parties entitled to the estate, and although they were under the necessity of suing in the trustee's name, a Court of equity could have interfered to protect their rights, and to prevent the person in possession setting up the statute improperly.

He has no defence against the claim of the trustee except length of possession, but the trustee would reply now (and would then have obtained the same relief in equity), I am suing on behalf of the equitable owner, whose title accrued only within twenty years, and the statute therefore, as against her, is no defence.

I am speaking of what would have been the position of parties before the Act of 1873, and I see nothing in that statute to alter that relation. Section 31, it is true, enables a party to bring an ejectment in the Court of Chancery, which, prior to that time, he could only have brought in a Court of law, but it does not, in my opinion, enable a *cestui que trust* to sue in his own name, nor in the case of *Heath v. Pugh*, 6 Q. B. Div. 345, authority for any such position.

It establishes, as I read it, only this, that when a mortgagee, under an ordinary decree of foreclosure absolute, takes proceedings to recover possession of that land, he

seeks possession of that which, by a title newly accrued, has for the first time become his own property, and that it can make no difference whether the title which he previously had as a mere incumbrancer was or was not protected by the legal estate.

Previous to the foreclosure the time could only run against the mortgage title then vested in the plaintiff. Proceedings were taken in equity within the statutory period and resulted in foreclosure. The new title by foreclosure first accrued upon and by reason of the forfeiture of the defendant's equity of redemption. The plaintiff then became the absolute owner of the land of which he had previously the legal without the full beneficial ownership, the order of foreclosure operating to transfer the equitable estate as effectually as if it had been conveyed or released.

The case seems to me to support the view for which I have been contending, and shews that before the Act of 1873, a Court of Equity would have interfered to protect its own jurisdiction, and would not allow the suitor to be evicted at law, who had an equitable right to the land.

To summarize my views :

(1.) I am of opinion that, notwithstanding the passage of the Judicature Act, the equitable owner is not entitled to proceed against a trespasser in his own name, but is still compelled to use the name of the trustee of the legal estate in order to recover possession.

(2.) That equitable titles are under the statute of 4 Will. IV, now distinctly recognized, and the Courts are bound to apply to them the rules of the statute, so that a person entitled in equity is bound to assert his rights within the same period during which he might have done so if he had been entitled at law to such an estate as he claims in equity.

(3.) That a person entitled to an estate in remainder-at-law having the right to sue at any time within ten years after his title becomes an estate in possession, a similar right is enjoyed by the owner of a similar estate in equity.

(4.) That such equitable remainder-man is not entitled, any more than the owner of a similar estate at law would

be, to take any steps to interfere with the possession during the existence of the particular estate.

(5.) That the failure of the equitable owner to assert his right within the prescribed period is attended with the same result as in the case of a legal owner, so that his right and title would be barred and extinguished within ten years from its accruer.

(6.) That, nevertheless, on the accruer of the right of an equitable owner in remainder he would have the right to put the trustee in motion for his benefit, and that previously to the passing of the recent Acts a Court of equity would have assisted his recovery, by restraining the party in possession from setting up the statutory bar against the trustee except so far as it applied to the equitable title.

In this view it is not necessary to express any opinion upon the preliminary objections which were raised.

I think the judgment appealed from correct, and that this appeal should be dismissed, with costs.

HAGARTY, C. J., and MORRISON, J. A., concurred in dismissing the appeal.

Appeal dismissed, with costs.

PARKHURST V. ROY.

Devise to government of foreign state—Supervision of trusts.

A testator directed his executors to pay and deliver the residue of his estate to the Government and Legislature of the State of Vermont, to be disposed of as to them should seem best, having regard to certain recommendations set forth in the will.

Held, [affirming the decree, 27 Gr. 361,] that the State was sufficiently designated as the legatee to entitle it to take the bequest; and the fact that the bequest was for the benefit of, and to take effect in a foreign country, could not be urged as an objection to its validity; neither could the objection that the State could not be made amenable to the Courts of the State, and thus there would not be any supervision of the trusts, as it must be assumed that a sovereign State would not do anything to violate a trust; besides which it appeared that the Legislature was not, in reality, to assume the trust, their duty being to appoint trustees who would be amenable to the Courts.

Held, also, that the direction for accumulation did not render the bequest invalid, it being for the Courts in Vermont to say whether the direction should be carried out.

THIS was an appeal by the plaintiff from a decree of the Court of Chancery, [reported 27 Gr. 361] and came on for argument before this Court, on the 14th of September, 1880, and in consequence of the death of Moss, C. J., again on the 12th September, 1881

The facts appear fully in the report of the case in the Court below.

W. Cassels and *Black*, for the appeal, contended that the trusts of the will of the testator, Arunah Huntington, were illegal according to the laws of the state of Vermont; and that the State could not be compelled to act as trustee under any will; besides which the Courts of the State have not the power of enforcing as against the State any trusts. They further urged that the will here provided for an illegal accumulation; and according to the laws of Ontario—the domicile of the testator—the trusts created in favour of the State of Vermont by this will were void *Levy v. Levy*, 33 N. Y. 97; *Milford v. Reynolds*, 1 Ph. 192; *Lyon v. East India Co.*, 1 Moo. P. C. 298; *Martin v. Maughan*, 14 Sim. 230, were referred to.

(*) *Present*—SPRAGGE, C. J., BURTON, PATTERSON, and MORRISON, JJ. A.

Bethune, Q. C., and *Moss*, Q. C., for the respondent. By the Law of Ontario the bequest of the personal property is valid, and it is shewn that subsequent to this devise the Senate and House of Representatives of the State of Vermont passed a resolution accepting the legacy, and undertaking to assume the duties of the trust expressed in the will; and having accepted the trust, the State is competent to act as the trustee; *Perry* on Trusts, secs. 41, 45; *Nightingal v. Goulbourn*, 2 Ph. 594; *Lewin* on Trusts, 3rd ed., p. 167; *Jarman* on Wills, 3rd ed., p. 356. The case of *Levy v. Levy*, referred to by the appellant, has been over-ruled. See *Washburn's Law of R. P.*, 3rd ed., vol. 3, p. 443, and *Bigelow's Over-ruled Cases*, 296.

Hardy, Q. C., for the executors under the will.

September 23, 1882. SPRAGGE, C. J.—There are some points in the judgment appealed from which are, in my judgment, so fully sustained by the reasons given by the learned Judge, and by the authorities cited, that I will, as to those points, content myself with expressing my concurrence in the judgment upon them.

These are: That the domicile of the testator was in the Province of Ontario; that the evidence establishes that the property of the testator in the United States was all of a personal nature; and, being so, that the validity of his bequests of personalty is to be decided by the law of Ontario—his domicile; that under a bequest to “the Government and Legislature of the State of Vermont,” there is a sufficient designation of the State of Vermont as the legatee to entitle the State to take the bequest, if otherwise entitled; that it is not a valid objection to the bequest that it is for the benefit of a foreign country, and to be carried into execution in a foreign country—the fund, upon reaching that country, being beyond the control of the Courts of this country.

I do not propose to discuss the question whether, under the terms employed by the testator in his will, a trust is created. The inclination of my opinion is, that if the like

terms were employed in the disposition of property in this country, the will to be administered in this country, it would be held that there was a bequest upon trust. But it appears to me to be unnecessary to decide that question. The case has been treated as if the will appointed, or intended to appoint, the State of Vermont to be trustee, and the evidence of experts is to the effect that the State could not be made amenable to the Courts of the State. The will, as I read it, does not purport to place the State in that position. It was competent to the State of Vermont to accept or refuse this bequest. There is an instance of a bequest for charitable purposes, as the law might call these, being refused: *New v. Bonaker*, L. R. 4 Eq. 655. What is contemplated by this will is not that the State of Vermont should be placed in a position in which it could be called to account by the Courts of the State, or by any power whatever. The will does not propose that the State should administer the fund, but that the Legislature should appoint trustees, by whom the fund should be administered; and who would of course be amenable to the Courts of the State, as indeed is shown very clearly by the case of *Burr's Executors v. Smith*, 7 Verm. 241, to which the Court was referred by Mr. Phelps, one of the experts examined in the case, as containing the law upon that point in the State of Vermont. The will prescribes nothing to be done by the State for which the State could, even if amenable in matters of civil right to any foreigner, be brought to account; for the testator only expresses his desire that his suggestions and recommendations should, "as far as may be," be carried out, thus leaving it to the discretion of the Legislature to observe his recommendations, in matters of detail at any rate, so far, and so far only, as they might think fit.

The testator died on the 10th of January, 1877. The plaintiff filed his bill on the 28th of August, 1877, and therefore before the Legislature had an opportunity of accepting or rejecting the bequest. This appears from the resolution accepting it being passed at the biennial session of 1878. The next preceding session must have been in

1876. I am not saying that the plaintiff filed his bill with any undue haste. If he had any rights in the fund it was quite proper that he should take steps to prevent its passing beyond the control of the Courts of the Province.

The Legislature of Vermont, then, as early as it could be done, accepted the bequest, and took upon itself what may be termed an honorary obligation to discharge the "trust," the word used in the resolution accompanying the acceptance of the bequest. And this having been done as soon as it could be done, the position of the plaintiff, as well as of the State, must be the same as if it had been done before he had filed his bill.

It is not even suggested by the bill, nor has it been suggested by the evidence, or in argument, that there is any danger of the fund being applied to any purpose, other than the purpose designated by the will. The objections taken are purely legal objections. They are founded on the assumption that the State of Vermont is made a trustee, and that no supervision can be exercised over its administration of the trust. I agree with the learned Judge appealed from that it will not be presumed that a sovereign State requires such supervision; that it would do any thing to violate what it has accepted as a trust. If the Legislature had taken the initial step, after accepting the bequest, of appointing trustees as suggested by the will, even the technical objection, that there would be no supervision of the fund, would have had nothing to stand upon. This may have been done since, or the doing of it may have been postponed until the details of the trust should be settled by the Legislature; or it may be postponed during the pendency of this litigation. However that may be, we are not to presume that the Legislature will now, in bad faith, stop short in the duty it has taken upon itself—take the benefit and ignore the purpose for which it was conferred. This is not even suggested, and it is not to be presumed.

I agree in the judgment appealed from that the direction for accumulation does not render the bequest invalid.

It will be for the Courts of the State of Vermont, should the question be raised there, to say whether the direction for accumulation shall be carried out, or the period of enjoyment accelerated. It was not necessary for the Court of Chancery here to determine anything beyond the question whether the direction given avoided the bequest, and the Court has, in my opinion, rightly decided that it has not that effect.

I agree in the judgment appealed from, that so far as the devise affects real estate it is void, inasmuch as it contravenes the statutes of mortmain, which, as has been adjudged in many cases, are in force in this Province.

My conclusion, therefore, is, that the decree of the Court of Chancery should be affirmed. I do not quarrel with the direction of the decree as to costs, but I think the costs of the appeal should be borne by the appellant.

BURTON, PATTERSON, and MORRISON, JJ. A., concurred.

Appeal dismissed.

REGINA EX REL. GRANT V. COLEMAN.

Quo warranto—Municipal elections—Appeal.

The Judge of the County Court ordered a writ of *quo warranto* to test the validity of the election of an alderman; and subsequently, before appearance entered to the writ, set aside all proceedings in the matter for irregularity. The relator thereupon applied in Chambers for a *mandamus* to compel the County Judge to try the case, when the presiding Judge (HAGARTY, C. J.) refused the writ; and on motion in *banc* the Court affirmed his ruling (see 8 P. R. 497, 46 U. C. R. 175).

On appeal from this judgment, the appeal was dismissed on the ground that the order of the County Judge, if he had authority to make it, was not subject to review; and if it could be reviewed the application should have been to the Court, not to a Judge in Chambers, as here; and under all the circumstances the appeal was dismissed, but without costs.

The writ of *quo warranto* having been issued and served, the County Court Judge had not power to set it aside.

THIS was an appeal by the relator, Donald Mason Grant, against a judgment of the Queen's Bench Division discharging, with costs, a rule *nisi* obtained to reverse a judgment of the Chief Justice of that Court. His Lordship had discharged a summons obtained from Osler, J., to rescind an order made by the County Court Judge of Carleton, quashing the writ of summons, in the nature of a *quo warranto*. The facts are fully set forth in 46 U. C. R. 175, and in the judgment.

The appeal came on to be argued before the Court on the 23rd of January, 1882.*

McMichael, Q.C., for the appellant.

Aylesworth, for the respondent.

Re Sawers v. Stevenson, 5 C. L. J. 42; *The Queen ex rel. O'Dwyer v. Lewis*, 32 C. P. 104; *McManus v. Ferguson*, 2 U. C. L. J. N. S. 19; *Trainor v. Holmes*, 7 U. C. R. 548; *In re Woods and Bennett*, 12 U. C. R. 167; *McKinn v. Hogg*, 15 U. C. R. 140; *White v. Esch*, 18 U. C. R. 226; *In re Keenahan v. Preston*, 21 U. C. R. 461, were referred to.

*Present: BRADY, C. J. O., BURTON, PATTERSON, and MORRISON, J. A.

shall direct a writ of summons in the nature of a *quo warranto* to be issued to try the matters contested."

Section 185. "The writ shall be issued by the clerk of the process of the said Superior Courts, or by the deputy-clerk of the Crown in the County in which the election took place, and shall be returnable before the Judge in Chambers of the proper Court at Toronto, or before the Judge of a County Court at a place named in the writ, upon the eighth day after service, computed exclusively of the day of service, or upon any later day named in the writ."

Section 186. The writ is to be served personally, but if the party keeps out of the way, *the Judge* may make an order for substitutional service. I take *the Judge* here to be the Judge who ordered the writ to issue.

Section 187. "*The Judge before whom the writ is made returnable or is returned*, may, if he thinks proper, order the issue of a writ of summons at any stage of the proceedings to make the returning officer or any deputy returning officer a party thereto." This may or may not imply that the County Judge may make the writ returnable before a Judge of the Superior Courts in Chambers. It apparently relates to proceedings after the contest is entered into upon the return of the writ, because the facts making it proper to call on the returning officer would only then appear.

Section 188. *The Judge before whom the writ is returned* may allow any person entitled to be a relator to intervene and defend.

Section 189 regulates the mode of trial before *the Judge*, and authorizes, *inter alia*, issues to be sent to be tried by a jury by writ of trial directed to any Court named by *the Judge*. Evidently this Judge is the one who hears the case, and so is the Judge referred to in most of the following sections.

Section 190. The Judge is, by writ, to remove the person whose election is declared invalid, and admit the one entitled to the seat, or cause a new election to be held.

Section 192 authorizes a disclaimer by the person served,

to be sent to the clerk of Judges' Chambers at Osgoode Hall, or to the Judge of the County Court of (as the case may be).

Sections 197 and 198 touch the power of *the Judge* over costs.

Section 199. The decision of *the Judge* shall be final, and he is to return the writ and judgment, &c., into the Court from which the writ issued, there to remain of record as a judgment of the said Court. And *he* shall, as occasion requires, enforce such judgment by a writ in the nature of a peremptory writ of mandamus, and by writs of execution for the costs awarded.

The object of the Legislature in these provisions is manifestly to make the proceedings upon the trial of a controverted municipal election as speedy and as simple as is consistent with fairness to the defendant. Everything is to be done by *the Judge*; nothing, so far as the expressed intention is concerned, by the Court. Even the judgment, which formally becomes the judgment of the Court, is to be enforced by *the Judge*. This is the law as it has existed since 1858, when, by the statute 22 Vict. ch. 99, it was put in its present shape. A glance at the earlier statutes will shew that the policy of the Legislature, as indicated by the provisions we are considering, had been reached by gradual advances. Under the statute of 1849, by which our present form of municipal government was initiated, 12 Vict. ch. 81, only the Superior Courts, or rather the Queen's Bench, which was then our only Superior Court of Common Law, or a Judge thereof, had jurisdiction; and by sec. 142 of that statute the judgment pronounced by a Judge was examinable by the Court in term. On 1st January, 1850, the Act which created the Court of Common Pleas, 12 Vict. ch. 63, came into force; and by an amendment of the municipal law made in that year, by 13 & 14 Vict. ch. 64, the jurisdiction was extended to both the Superior Courts of Common Law and the Judges thereof. Under these statutes there was little, if any, difference between an election contest and an ordinary suit, with

regard to the jurisdiction and powers of the Court in which it was conducted. In 1853, for the first time, the Judges of the County Courts were, by 16 Vict. ch. 181, given authority to order the issue of writs for the trial of these contests, and to try them; but their judgments, like those of the Judges of the Superior Courts, were subject to review. Section 152 of the Act of 1849 remained unrepealed; and section 147 was re-enacted with the necessary variations to include County Court Judges. The substance of this section was repeated in section 128, subsection 17, of the Act of 1858, but with further variations very material to be kept in view in construing the present law. Subsection 17 is our present section 199. By section 147, as originally enacted in 1849, and as re-enacted in 1853, the Judge was to deliver the writ and his judgment, &c., into the Court from which the writ issued, there to remain of record as a judgment of the said Court, "*as other judgments rendered therein*;" and such judgment was thereupon to be "enforced by peremptory mandamus and by such writs of execution for the costs awarded by such judgment, as occasion shall or may require." Thus there was a judgment of the Judge, from which an appeal lay to the Court; and the judgment became a judgment of the Court, *as other judgments rendered therein*; and writs of mandamus or *fi. fa.* or, in those days, even writs of *ca. sa.* were to be issued as the Act of the Court, just as upon any judgment of the Court.

Now, let us mark the change wrought in 1858 by subsection 17, and now continued by section 199. In the first place the judgment was made final. The Court could no longer review the decision of the Judge. In the next place, while the judgment was still to remain of record as a judgment of the Court, it was to be a judgment *sui generis*, as indicated by dropping the words "*as other judgments rendered therein*." And lastly, the Court was no longer to enforce its own judgment, but that was made the province of *the Judge*—"and *he* shall, as occasion requires, enforce," &c,

On the one hand there was the danger of want of uniformity in the exposition of the law, with the chance now and then of an erroneous decision; and on the other hand there was the delay necessarily attendant on an appeal, which in the case of one of these contests was liable to prove *pro tanto* a denial of justice. The choice lay between the two evils, and the Legislature deliberately chose the former as the least. The deliberate character of the choice is shewn by the fact mentioned in *Harrison's Municipal Manual*, that the old clause giving the appeal was contained in the bill when introduced in 1858, but was struck out during its passage. Of course it may be said that it is the Court that issues the writ, and therefore the Court enforces the judgment. Technically that may be so; but under the statute, that is only done in obedience to the order of the Judge. The Court has no more control over the issuing of the writ than it has over the rendering or recording of the judgment. For all the purposes or functions of a tribunal, the Judge alone is recognized or endowed with power. The machinery of the Court is made use of; but, except in that particular, it is my opinion that the proceedings are not to be regarded as an action, or as analogous to an action, in the Court. I think the intention that the ordinary control which the Court has over the proceedings in an action shall be, in these cases, excluded, is sufficiently shewn.

The abolition of the power to review the final judgment would seem to imply the intention that no such power should exist as to interlocutory matters, and the general tenor of the enactments is, I think, entirely in that direction.

The order now complained of, if within the jurisdiction of the County Judge, was not, if my reading of the statute is the true one, subject to review. If it had been otherwise, I take it that the application against it ought to have been to the Court and not to a Judge in Chambers.

If it were without the Judge's jurisdiction, then the

proper course was, to apply for a *mandamus* to compel him to hear and determine the contest. That was a proper motion for Chambers, and it was made, and was properly refused for reasons independent of the matters now in discussion.

The relator professes to be apprehensive that the Judge may enforce the order for the costs. If the Judge were so acting without jurisdiction, an application for a prohibition might be proper; but I do not find that the relator suggests what action he apprehends. No execution can, under this statute, issue, except on a final judgment, and I have no idea what process is supposed to be possible for the enforcement of these costs.

My conclusion is, that in no view of the case can the order which the relator asks for be made. Therefore, whether we agree with the majority of the learned Judges in the Courts below or with the minority, we cannot avoid dismissing the appeal.

But as we are told that the principal object in pressing the case is, to obtain an expression of opinion as to the power of the Judge, I have no objection to state my view of the law.

I agree with the learned Judges who hold that the Judge having made his order for the writ, and the writ having issued and having been served, he has no power to set it aside. For the protection of the seat-holder against merely vexatious attacks, the law requires the Judge to be satisfied that reasonable grounds are shewn, and requires security to be given. Once the writ has gone, I find no warrant for the Judge's interference until its return, except in the one case of ordering substitutional service when necessary. No such statutory right to criticise or falsify the materials which have satisfied the Judge is given as in the case of a writ of arrest in an action. And the defendant being merely summoned to appear, there is not the same reason for it. When he appears the charges have to be proved. If they are not sustained, he is indemnified for his costs. If they are

sustained, he is deservedly unseated, whether or not the charges have been clearly or formally set before the Judge in the preliminary affidavits. It would be counter to what I take to be the policy of the Act, as well as, in my judgment, unnecessary for the reasonable protection of the defendant, to afford the means of creating delay which applications like the one in question would supply, and which might be used to the prejudice of the electors, by enabling one who had no right to represent them to retain his seat for a longer time than would be made necessary by the requirements of a fair contest.

It was remarked by the Chief Justice of the Queen's Bench, in the course of his judgment in this case, that if we hold that the County Court Judge had not jurisdiction to set aside his fiat and the writ, it would equally have to be held that a Superior Court Judge had no such power. I agree entirely with this, but I think that instead of both classes of Judges having the power, it belongs to neither of them.

I have not referred to the general rules made by the Judges under their statutory power, because they were made in 1851, under the original constitution of the election tribunals, and therefore cannot aid in elucidating the law in its present shape.

I think we should simply dismiss the appeal, not giving costs to either party.

SPRAGGE, C.J., BURTON and MORRISON, J.J.A., concurred.

Appeal dismissed, without costs.

SMITH V. GOLDIE ET AL.

Patentable invention.

The plaintiff claimed as his invention, for the purpose of purifying flour during its manufacture, a bolting cloth or sieve, through which a current of air was forced upwards by means of an air chamber and a fan, or substitute therefor, and, in order to keep such sieve from becoming clogged, a brush, or a number of brushes, arranged in such a manner as to traverse the under service. The air chamber and the fan combined with the bolt or sieve were admittedly old; and it appeared that one R. had patented a machine which was in use in the manufacture of semolina, in which a similar brush arrangement was in use for the purpose of keeping open the meshes of the sieve when used.

Held, (affirming the judgment of SPRAGGE, C.,) that the plaintiff's invention was not patentable.

Quære, as to the effect under sec. 28 of the 35th Vict. ch. 26, D. of a decision of the Minister of Agriculture.

THIS was an appeal from a decree of the Court of Chancery, pronounced by the Chancellor [Spragge,] dismissing the bill, with costs. The bill was filed in the Court below, praying that, under the circumstances stated in the bill, and which are fully set forth in the judgment, it might be declared, (1) that the plaintiff Smith was the first and true inventor of the invention, the subject of the patent 2257; (2) that the patents 1739 and 1793, had never been of any validity as against the plaintiffs, and that the patent 1793 might be avoided, and that it might be declared that the claim under 2257 was valid and effectual for all purposes, notwithstanding the said other patents; (3) that an account might be taken of the profits made by the defendants from the sale of machines constructed by them according to the said patent (2257), or upon the principles thereof or any of them, and which infringed such patent; (4) that an account of damages sustained by the plaintiffs might be taken, and the defendants ordered to pay the same; (5) that the defendants, their solicitors, &c., might be restrained from denying the validity of the patent 2257, and from making and constructing, using, or vending the machines in the bill mentioned, or any other machine embodying or involving such invention or any part thereof, and from causing or pro-

curing the same to be manufactured ; and from infringing the said patent ; (6) that they might also be restrained from publishing any advertisement or notice tending to injure the business of the plaintiffs, as holders of such patent right ; and for further and other relief.

The ground principally relied on by the Court in dismissing the bill was that the patentee had, after the expiration of twelve months from the granting of the patent, imported into this province the machine for which the patent had been granted.

The plaintiffs thereupon appealed to this Court, and the appeal came on to be argued on the 15th, 16th, and 17th days of December, 1880.*

Ferguson, Q. C., and Howland for the appellants.

W. Cassels and G. W. H. Ball for the respondents.

The cases cited and arguments of counsel appear in the judgment.

June 30, 1882. PATTERSON, J. A.—The plaintiffs complain of the infringement of patent No. 2257. It will be useful, at the outset, to see to what this patent extends.

It was granted on the 18th of April, 1873, upon an application of the plaintiff, Smith, dated 11th January, 1873. The specification alleges that Smith has invented certain new and useful improvements in a machine for dressing flour. After describing the difficulty in ordinary methods of milling, to separate perfectly the bran or husk from the flour, the applicant states that with a view to effect a more thorough separation of the bran from the flour than has heretofore been accomplished, he has made the invention which he proceeds to describe.

The first part of it, he says, consists in combining with a flour bolt a fan, or its equivalent, and an air chamber, by means of which a current of air is made to pass through the bolting-cloth, a brush, or a series of brushes,

* *Present*.—BURTON, PATTERSON, and MORRISON, JJ. A., and BLAKE, V. C.

arranged below the bolt and traversing its under surface to keep the meshes of the cloth free, and thus facilitate the passage of the current of air *upward*, through the bolt.

The second part consists in arranging a series of air chambers and dampers above the reciprocating bolt for the purpose of more effectually controlling and regulating the currents of air which pass through the different portions of the bolt.

The third part consists in combining the brushes with an endless belt, chain, or rope, by means of which they are made to travel continuously on ways and around pulleys, as and for the purposes thereafter set forth.

The specification then goes on to describe the mode in which the invention is to be put in operation, and concludes as follows :

"It is evident that the brushes would act upon the bolt equally well if they had a reciprocating motion instead of being driven continuously in one direction by the endless belts. Hence, although I regard the method shewn for operating them as being the cheapest and most convenient, I do not wish to be limited by the construction shewn. I am aware that a single air chamber arranged above the bolt, and covering the entire surface thereof, is old, as is also a series of air chambers arranged below the bolt, but I regard my construction as being an improvement upon either of the earlier ones, as it is very difficult to so adjust the draft in a single chamber as to adapt it to the variation in the weight of the bran and other impurities, as the meal progresses from one end of the bolt to the other.

"It has been found in practice that the arrangement of a series of chambers below the bolt, which necessitates the employment of a blast, is a very defective one, as the blast forces the refuse matter out through every crevice in the casing, and renders it almost impossible to properly control the discharge of the refuse at a suitable point.

"This arrangement also precludes any effective application of brushes to the under side of the bolt. Thus, while the change seems but a slight one, it is in my machine quite an important one.

"Having thus described my invention and means by which the same may be carried into effect, I would have it understood that what I claim and desire to secure by letters patent is:

"1st. In combination with the bolting surface of a flour bolt through which a current of air is made to pass by means of an air chamber and fan, or its equivalent, I claim a brush, or a series of brushes, arranged to traverse the under surface of said bolt, substantially as and for the purpose set forth.

"2nd. In combination with a reciprocating bolt and an exhaust fan, or its equivalent, a series of air chambers, *E*, *F*, *G*, when arranged above said bolt and provided with separate air outlets and suitable valves or dampers for regulating the strength and velocity of the separate air currents passing upwards through the bolt cloth, substantially as described and set forth.

"3rd. The brushes *H*, *H*, when attached to an endless belt chain, rope, or an equivalent of the same, and travelling in one direction on ways and around pulleys, as shewn in combination with a reciprocating bolt, upon the cloth of which they are made to impinge, substantially as and for the purpose described."

On the 26th of September, 1879, the plaintiff Smith executed a disclaimer of the 2nd and 3rd claims, thus confining the patent to the first, viz., a brush, or series of brushes arranged to traverse the under surface of the bolt, that device being applied in combination with the bolting surface of a flour bolt through which a current of air is made to pass by means of an air chamber and fan.

The bill was filed 22nd July, 1879, two months before the disclaimer, but issue was not joined until the 10th of February, 1880.

The machine, of which the invention is put forward as an improvement, is for the purpose of separating certain portions of the grain of wheat which are described as "impurities" from the product of grinding termed "middlings," which middlings, after being thus purified,

are reground, and made into flour. The "impurities" are lighter than the middlings, and are, by means of the machine, drawn off by a current of air which is made to pass upward through the sieve over which the middlings are passing. The upward current of air is produced by a fan which creates a vacuum at the upper part of the machine, and it passes through one or more air chambers so arranged as to enable the operator to keep it in control.

The sieve is what in the specifications is called a bolt. It is made of bolting cloth stretched upon a flat frame, and is hung horizontally in the machine, receiving what is called a reciprocating motion, or shaking, from a proper mechanical appliance.

The current of air passing upward from below the sieve carries with it flour-dust and light substances which adhere to the bottom of the sieve and close the meshes of the cloth, preventing the air from passing through and performing its office of purification. Hence the necessity for a brush applied to the bottom of the sieve to keep the meshes clear.

This is what the patent, as limited by the disclaimer, is confined to. The exhaust fan, the air chambers, and the reciprocating bolt or sieve are admitted to be older than the plaintiff's invention; but he claims that whereas by themselves they were not practically useful, notwithstanding that they embodied a process in the operation of milling of recent discovery and of undoubted value and importance, for want of some efficient method for preventing the clogging of the sieve, he has made the whole process efficient by combining with them a brush or series of brushes arranged to traverse the under surface of the sieve.

In practice, the plaintiff attaches the brushes to an endless belt passing round rollers, on which, by a simple adaptation of the machinery, they are made to pass along and in contact with the under surface of the sieve, their position at this part of their revolution being regulated by ways or guides. His drawings, accompanying the specifica-

tions, shew this system of working, but he claims as his invention the application of brushes in the described combination, by whatever mechanical device they are made to do their work.

The history of the invention we have from the evidence of Mr. Smith himself and one or two other witnesses.

A machine such as that in question, but without brushes, had been in the beginning of 1871 erected in a mill in Minneapolis, in the State of Minnesota, called the Washburn Mill, worked by one Christian. The plaintiff, who had been from his boyhood engaged in mills, was employed in February, 1871, to work in the Washburn Mill. He there saw the machine, which had been constructed by a man named La Croix, and was called the French machine, and he saw the difficulty in making it work by reason of the clogging of the sieve in the manner I have described. A workman in the mill, named Bevis, was set to keep the sieve clear by using a hand brush. The plaintiff Smith says this was done upon his suggestion. Smith and Bevis differ in their accounts of the way in which the brush was used. Smith says it was used on the top of the sieve. Bevis says he used it below. However this was, it was while the handbrush was in use that the idea occurred to Smith that brushes might be worked by the machinery, and he promptly procured brushes and belting, and constructed his apparatus. There is again some discrepancy in the recollection of the two men as to how long it took to put the idea into practical operation; but, at the outside, it was not over two days. The success of the contrivance was complete, and the process thus made effective has, it is said, wrought a revolution in the manufacture of flour. The benefits derived from it are described in the evidence, but the details are aside from our present purpose. The device is beyond question useful.

The brushes were attached to the French machine in April, 1871. In July of the same year the plaintiff Smith filed his application for a patent in the patent office at Washington, but did not obtain a patent until December.

1872, the delay being caused by contests with conflicting applications. He obtained his patent, 2257, in Canada, on the 18th April, 1873, upon an application filed in the preceding January.

In the specifications forming part of the American patent, after describing the machine and the use of the brushes, he says:—

“I do not claim the application of brushes to the under surface of the bolt, as that is admitted to be old; but what I do claim in this application is, the brushes *HH* when attached to an endless belt, chain, rope, or an equivalent of the same, and travelling in one direction on ways and around pulleys, as shewn in combination with a reciprocating-bolt, substantially as set forth.”

On 1st June, 1875, Smith obtained another patent at Washington upon the application of July, 1871. The specifications with it do not differ materially from those with the Canadian patent. I make two extracts from them. One is in these words:

“I am aware that a combination of brushes and air-currents has been used in connection with flour-bolts for many years; but in such machines the air-current passed through the bolting-surface with the flour; hence it could not, by any possibility, be made to perform the same functions as it does in my machine, one of which is to float a portion of the bran and refuse upon or above the bolting-surface, and thus cause such particles to pass off at the tail of the bolt, instead of going through the cloth with the flour or clean middlings.”

The other is the statement of his claim, which he makes, reserving to himself the right to claim all other novel features in other divisions of his application:

“I claim the combination in a machine for dressing flour or middlings, of a bolting surface through which an air-current passes in one direction, while the flour or middlings pass in the other, with a brush, or a series of brushes, which traverse the under side of the bolting-cloth to remove the adhering particles of flour, substantially as set forth.”

Two patents were issued in Canada to other persons for machines similar, so far as the principle of brushing the

under side of a sieve, or shaker, and the purification of middlings by means of a current of air passing upward through the sieve, were concerned. One of these was granted to one Sherman, and the other to LaCroix who had made the French machine. Both of these were earlier than the plaintiff's Canadian patent, both being issued in 1872. They were also earlier than his first American patent, though not earlier than the filing of his application.

It was also shewn that one Buchholz had patented, in the United States, in 1869, a machine which two years earlier he had patented in England, for manufacturing semolina and flour. The term semolina is explained by a witness as meaning cracked wheat. In this process the grain passed between different pairs of rollers, and was conveyed from one pair to the next in inclined troughs, which formed sieves and were shaken by machinery, separating the finer portions by sifting, and carrying forward the coarser. In order to keep open the holes or meshes in the bottom of the troughs, cylindrical brushes were employed to traverse to and fro under the troughs, and brush out any obstructions to the descending semolina. The mode of arranging the brushes and imparting to them the transverse motion is described in the specifications which were put in evidence.

The defendants manufacture machines under the LaCroix patent, and have also acquired the Sherman patent.

The question of priority is, of course, amongst those raised : but before it is reached, we have to decide whether the plaintiff's patent is for anything new.

The person entitled to a patent is one who has invented any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement in any art, machine, or manufacture, or composition of matter, not known or used by others before his invention thereof, and not being in public use or on sale for more than one year previous to his application, in Canada, with the consent or allowance of the inventor thereof: 35 Vict. ch. 26, sec. 6 (D).

Several facts are clear, either from the evidence of the

patentee or from his statements in the documents from which I have quoted.

(a) The machine, constructed essentially as he constructs his improved machine, with fan, air chamber and reciprocating sieve, made for the purpose of purifying middlings by means of an upward current of air, but without the brush attachment, is not claimed as his invention: it was the French machine.

(b) A combination of brushes and air currents had been used in connection with flour bolts for many years.

(c) The application of brushes to the under surface of the bolt is old.

(d) Then, turning to the disclaimer, filed pending this suit, we find Smith declaring that through mistake, accident, or inadvertence, he had made the claim in his specification too broad, as being the first inventor of a material or substantial part of the invention he patented, of which he was not the first inventor, and to which he had no legal right, and therefore disclaiming, for one thing, "the brushes when attached to an endless belt, chain, rope, or an equivalent of the same, travelling in one direction on ways and around pulleys, as shewn in combination with a reciprocating bolt upon the cloth of which they are made to impinge as described."

The question asked by counsel for the defendants, in view of these pieces of evidence supplied by the plaintiffs themselves, was very pertinent: What is there left?

What is left is simply the combination of the brush or series of brushes arranged to traverse the under surface of the bolt, with the bolting surface of a flour-bolt through which a current of air is made to pass by means of an air chamber and fan, or its equivalent.

I believe there is no evidence that any one before Smith had arranged brushes to traverse the under surface of a bolt through which a current of air was made to pass by the means he describes—that is to say, the precise combination may have been new.

Brushes had been applied to the under surface of bolts. That he admits.

He disclaims the title of inventor of the combination of brushes, travelling as he makes his travel, with a reciprocating bolt.

He declares that the combination of brushes and air currents had been used in connection with flour-bolts for many years.

Looking outside of his own evidence, we find Buchholz's patent for brushes arranged to traverse the under surface of a sieve (which is what Smith calls a bolt) for the purpose of keeping the meshes open; only there is the current of air passing through Smith's sieve, while that of Buchholz is unventilated. The same language will describe the brush arrangement and its immediate object in both patents.

If Buchholz should desire to purify the meal which he calls semolina, by the process employed to purify the meal called middlings, and should attach to his machine the fan and air chambers, to which Smith has no claim, can it be contended that Smith's patent would stand in the way of his using his brushes in the mode specified in his own patent? The supposition is too extravagant for argument, and yet he would be using the very combination which is claimed as a patentable invention.

I am quite willing to accept the doctrine acted upon in *Murray v. Clayton*, L. R. 7 Chy. 570, and to hold that a new process carried on by known implements or elements, acting upon known substances, and ultimately producing some other known substance, but producing it in a cheaper or more expeditious manner, or of a better or more useful kind, is patentable as a new invention; but the process or the combination must be new.

I also think, as I remarked in *Yates v. Great Western R. W. Co.*, 2 App. 240, that a satisfactory test of novelty, and one which is fair towards the patentee, is that suggested by Lord Chelmsford in *Penn v. Bibby*, L. R. 2 Chy. 127, namely, whether the new application lies so much out of the track of the former one as not naturally to suggest itself to a person turning his mind to the subject.

This proposition he introduces, after a reference to two other cases, in a passage of his judgment which is so apposite as to warrant its citation. "It is very difficult," he says, p. 135, "to extract any principle from the various decisions on this subject which can be applied with certainty to every case; nor, indeed, is it easy to reconcile them with each other. The criterion given by Lord Campbell in *Brook v. Astor*, 8 E. & B. 485, has been frequently cited, that a patent may be valid for the application of an old invention to a new purpose, but to make it valid there must be some novelty in the application. I cannot help thinking that there must be some inaccuracy in the report of his Lordship's words, because, according to the proposition, as he stated it, if the invention is applied to a new purpose, there cannot but be some novelty in the application. Lord Chief Justice Cockburn approaches much nearer to the enunciation of a principle, or at least of a rule, for judging these cases in *Harwood v. Great Northern R. W. Co.*, 2 B. & S. 208, where he says: 'Although the authorities establish the proposition that the same means, apparatus, or mechanical contrivance, cannot be applied to the same purpose, or to purposes so nearly cognate and similar as that the application of it in the one case naturally leads to the application of it when required in some other, still the question in every case is one of degree, whether the amount of affinity or similarity which exists between the two purposes is such that they are substantially the same, and that determines whether the invention is sufficiently meritorious to be deserving of a patent.'

Tried by Lord Chelemsford's test, the plaintiff's claim of novelty cannot, in my opinion, be sustained.

When we speak of a new application of a known contrivance being so similar to its former use as to be naturally suggested to a person turning his mind to the subject, we necessarily refer to a person who knows of the former use.

The data for the test are, *first*, a want to be supplied, viz., some method of clearing the meshes of a sieve clogged by matter carried upwards from below it: *secondly*, a process already in use for clearing the meshes of a sieve clogged with matter passing through it from above, viz., a brush traversing the under surface of the sieve, as in the Buchholz patent: *thirdly*, a person who knows of the existing

apparatus and is considering how to supply the new necessity.

The object aimed at is so far from being out of the track of the former use, that it is as nearly as possible identical with it.

This cannot be answered by asking why then did not Christian, or La Croix, or the inventor of the French machine think of it? We know nothing of the extent of these men's information about mechanical appliances. We do not know that the inventor of the very important application of the air current had suspected the tendency of his process to impede itself by stopping the meshes of his sieve. We may assume that Smith himself was unacquainted with the fact that brushes had been used to keep bolts clear: that he honestly believed that the idea originated with himself that day in Washburn's mill; and that in reality he invented the device without consciously borrowing the idea, just as Robinson Crusoe invented the mode of turning his grindstone by means of a wheel and a string which he worked with his foot, a contrivance which he tells us cost him as much thought as a statesman would have bestowed upon a grand point of politics, or a Judge upon the life and death of a man; although in both cases it turned out that the invention had been anticipated by some one else.

We are not testing the merits or the authorship of the mechanical device. Its merits are indisputable, and Smith now admits that he is not its author. We have to deal with the combination only; or, more strictly, with the application in the particular emergency of the old piece of mechanism. That application was distinctly within and not out of the track of its former use.

In the case of *Harwood v. Great Northern R. W. Co.*, while all the members of the Court of Queen's Bench appear to have concurred with the Lord Chief Justice in the rule which he enunciated, and which is quoted by Lord Chelmsford in the extract I have given, they all considered that the new purpose then in question was sufficiently distinct from the old use of the materials to warrant them

in holding that the invention might be the subject of a patent. A different view was taken of the facts in the Exchequer Chamber, 2 B. & S. 21, and afterwards in the House of Lords, 11 H. L. C. 654, 3 B. & S. 984, but there was no difference of opinion as to the principle. This was distinctly announced by Blackburn, J., who had taken part in the original judgment, and who, in his opinion delivered to the House of Lords for himself and Mr. Justice Shee, while considering that the judgment of the Exchequer Chamber was wrong, explained that the difference of opinion was not on any question of law, but only on the effect of the facts and evidence stated in the case.

Lord Westbury said, at p. 998: "Upon that I think the law is well and rightly settled, for there would be no end to the interference with trade and with the liberty of adopting any mechanical contrivance, if every slight difference in the application of a well known thing should be held to constitute ground for a patent."

Upon this infirmity alone the plaintiff's patent must fall to the ground.

Indeed, Mr. Howland in the course of his able argument, which left nothing unsaid that could be urged in support of the plaintiff's case, conceded that he must fail unless he could successfully distinguish this from Harwood's case.

Mr. Cassels for the defendants, when discussing the question of want of novelty, called particular attention to the language of the sixth section of the Act of 1872, 35 Vict. ch. 26, which is now in force, and the corresponding section of the Act of 1869, 32-33 Vict. ch. 11, sec. 6. which differs from that of the Act which had been in force in the Province of Canada, C. S. C. ch. 34, sec. 3.

The last named Act authorized the granting of a patent to the inventor of a new and useful art, &c.: "The same not being known or used *in this province* by others before his discovery or invention thereof." While that Act was in force, no one was entitled to a patent under it except a subject of Her Majesty.

The Act of 1869 extended the privilege to any person who had been a resident of Canada for one year before his

application, and that of 1875 removed the restriction as to residence, thus in all respects placing foreigners on the same footing with subjects; but at the same time, and as a complement of this extension of the privilege, required absolute novelty, and not merely novelty within the Dominion, in the invention. The language is, therefore, more general, as used in the two later statutes, "the same not being known or used by others before his invention thereof." He also pointed out that, under the former law, while novelty *in the province* was all that was insisted on, that demand would have been satisfied by introducing into the province for the first time something which was already well known abroad, the rule being the same as that deduced by construction in England from the statute 21 Jac. 1 ch. 3, and which is very lucidly explained by Sir George Jessel, M. R., in *Plimpton v. Malcolmson*, L. R. 3 Chy. D. at 555, and decided in several other cases to which Mr. Cassels referred us. The result of that state of the law, if it had prevailed, would have been that the patentees of the rival machines, who obtained their patents at Ottawa in 1872, must, as against the plaintiff Smith, have been held to be the first inventors, even though they may have merely pirated his discovery. Hence, if the plaintiffs had contended that prior knowledge of the discovery in the United States would not invalidate the Canadian patent under our statute, they would have merely changed their position from one horn of a dilemma to the other. No such contention was advanced, and I do not doubt that, in this particular Mr. Cassels correctly construed the statute.

I do not agree with him, however, in his argument as to the force of the words, "in Canada," in the part of section six which immediately follows the words I have been noticing: "And not being in public use or on sale for more than one year previous to his application, in Canada with the consent or allowance of the inventor thereof." Mr. Cassels would have us read these words as referring to the article being in use or for sale anywhere one year previous to the application in Canada; treating the words, "in Canada,"

as relating to the application and not to the use or sale; and, as applied to the facts, disentitling Smith to patent his invention here, because more than a year before January, 1873, when he filed his application at Ottawa, he had publicly used and sold his invention in the United States. I take the policy of the Act of 1872 to be identical in this respect with that of 1869; and the whole clause, as used in the latter Act less the limitation as to time, to be equivalent to that found in the earlier one, which is, "or not being at the time of his application for a patent in public use or on sale in any of the Provinces of the Dominion, with the consent or allowance of the inventor or discoverer thereof."

A good deal of the discussion before us turned on the provisions of the 28th section of the Act of 1872, and upon the facts on which it was urged those provisions became applicable to avoid the plaintiff's patent.

That section declares that every patent granted under the Act shall * * be null and void at the end of two years from the date thereof, unless the patentee, or his assignee or assignees, shall within that period have commenced, and shall, after such commencement, continuously carry on in Canada the construction or manufacture of the invention or discovery patented, in such manner that any person desiring to use it may obtain it, or cause it to be made for him at a reasonable price, at some manufactory or establishment for making or constructing it in Canada; and that such patent shall be void if, after the expiration of twelve months from the granting thereof, the patentee or his assignee or assignees, for the whole or a part of his interest in the patent, imports or causes to be imported into Canada the invention for which the patent is granted; and provided always, that in case disputes should arise as to whether a patent has or has not become null and void under the provisions of this section, such disputes shall be settled by the Minister of Agriculture, or his deputy, whose decision shall be final.

It is said that the plaintiffs are in default upon both the branches of this enactment: that no manufactory was established, and that an act of importation has been brought home to Smith, the patentee. I do not propose to

examine the evidence touching either of these charges. The patent being held invalid for other reasons, that inquiry would now be irrelevant. If this had been otherwise we should have had to pronounce upon an objection taken to our jurisdiction to entertain the question, which, it is argued, is the province of the tribunal specially designated in the section.

As a matter of fact the very same contest, upon the very same facts, has been heard and adjudicated upon by the Deputy Minister of Agriculture, one Benjamin Barter having been the disputant, and the plaintiff Smith the respondent. We have been furnished with a copy of the proceedings and the judgment delivered.

The objection taken before us is two-fold, viz., that the forum being designated, no other has jurisdiction to try the matter; and that whether or not the controversy might have been originated in the Court of Chancery as a defence of those attacked in that Court by the patentee, yet an adjudication having taken place, that must be treated as a judgment *in rem.*, and as conclusive against these particular objections to the continuance of the patent.

The inclination of my opinion is strongly in favour of the objection. There would be manifest inconvenience in the existence of independent tribunals, with no Common Court of Appeal, by which diverse judgments upon the same controversy might be rendered.

But, if the subject were one proper for our decision, I should be content to follow the very careful and able judgment of Dr. Taché, the Deputy Minister, which commends itself to me as a sound exposition of the principles upon which the law laid down by this section should be administered, as well as a judicious and discriminating investigation of the facts.

The appeal must be dismissed, with costs.

BURTON, J.—I agree in holding that this is not a patentable invention, and should add nothing to the able

and exhaustive judgment of my brother Patterson, but for a desire to place on record in the same connection, and in confirmation of his views, extracts from judgments recently delivered in the United States Courts by three very distinguished Judges, to which my attention has been drawn since the argument by the learned counsel for the respondents, and which so ably define the rule in reference to the patentable combination of old elements that it seemed to me desirable to add them here as a further elucidation of what is confessedly a very intricate and difficult subject.

The first is by Mr. Justice Strong in *Harles v. Van Norman*, 20 Wallace 368, where he said: "All the devices of which the alleged combination is made are confessedly old. No claim is made for any one of them singly as an independent invention. It must be conceded that a new combination if it produces new and useful results is patentable, though all the constituents of the combination were well known and in common use before the combination was made. But the results must be as products of the combination, and not a mere aggregate of several results, each the complete product of one of the combined elements. Combined results are not necessarily a novel result, nor are they an old result obtained in a new and improved manner. Merely bringing old devices into juxtaposition and then allowing each to work out its own effect without the production of something novel is not invention."

The combination to be patentable, said Mr. Justice Hunt in another case, *Beckendorfer v. Faber*, 92 U. S. at 357, must produce a different force or effect or result in the combined forces or processes from that given by their separate parts. There must be a new result produced by their union; if not so, it is only an aggregation of separate elements.

And again in a case decided in the Supreme Court of the United States on the 12th December last, *Pickering v. McCullough*,^(a) the Court used the following language:

"It is perfectly clear that all the elements of the combination are old, and that each operates only in the old way.

(a) Reported, Official Gazette U. S. Patent Office for December, 1881.

Beyond the separate and well known results produced by them severally, no one of them contributes to the combined result any new feature, no one of them adds to the combination more than its separate independent effect, no one of them gives any additional efficiency to the others, or changes in any way the modes or result of its action. In a patentable combination of old-elements all the constituents must so enter into it, as that each qualifies every other. To draw an illustration from another branch of the law, they must be joint tenants of the domain of the invention seized each of every part *per my et per tout*, and not mere tenants in common, with separate interests and estates. It must form either a new machine of a distinct character and function, or produce a result due to the joint and co-operating action of all the elements which is not the mere adding together of separate contributions. Otherwise it is only a mechanical *juxta position* and not a vital union."

Some of the remarks here made go to confirm the decision of this Court in the case of *Yates v. The Great Western R. W. Co.*, in which there was a difference of opinion, and in which unquestionably the defendants availed themselves of the plaintiff's brains, and used the mechanical *juxta-position* which had suggested itself to him, although the Court were reluctantly compelled to hold that upon the principle stated there was no invention in it.

I agree that we have no alternative but to dismiss the appeal.

MORRISON, J. A., and BLAKE, V. C., concurred.

Appeal dismissed, with costs

**MURRAY ET AL. V. THE CANADA CENTRAL RAILWAY
COMPANY.**

*Principal and agent—Misdirection—Practice—Application to adduce
evidence after verdict.*

The plaintiffs entered into a contract with one F. to fence an extension of the defendants' railway. F. was a shareholder of the defendants' company, and general manager of that part of the road which was in operation, and was contractor for the construction of the extension. The only writing between the parties was the following informal memorandum, prepared by one of the plaintiffs:

"RENFREW, 6 January, 1876."

"MEMORANDUM of fencing between Muskrat river east to Renfrew; T. & W. Murray to construct same next spring, for C. C. R. R. Co., to be equal to 5 boards 6 inches wide—posts 7 to 8 feet apart—for \$1.25 per rod. Company to furnish cars to distribute lumber.

"T. & W. MURRAY,
"A. B. FOSTER."

During the progress of the work F. drew drafts on the company, in favour of the plaintiffs, which were accepted and paid by them. They also allowed the plaintiffs to retain various sums due by them to the company as freight, charging the amounts at stated periods to F. and releasing the plaintiffs, who were in turn charged with the amounts by F.

The jury were asked whether the plaintiffs, when they made the agreement, supposed that they were contracting with the company, and were told that, though F. was not the agent of the company to make the contract, yet if he professed to be acting for the company and working in the company's name, it would be binding on the company, unless they repudiated it; and they were asked whether the company had adopted the contract, by paying money or allowing freight.

Held, per SPRAGGE, C. J. O., and BURTON, J. A.—That there was misdirection, as it was immaterial what the plaintiffs understood if F. had not authority in fact to make the contract; and that there could be no ratification or adoption of the contract by the company, unless they were, at the time, aware that it had been entered into by F. professedly as the agent of the company; and

Held, also, that the payments, whether by money or the allowance of freight, were not any evidence of adoption in the absence of such previous knowledge:

Held, also, that there was no evidence to go to the jury that F. so acted, or professed to act, and that the plaintiffs should therefore have been nonsuited.

OSLER, J., dissented, on the ground that there was no misdirection, and that the appellants had failed to convince him that the unanimous judgment of the Court below was wrong.

MORRISON, J. A., agreed with Osler, J.

The Court being thus equally divided, the appeal was dismissed, and the judgment of the Queen's Bench stood affirmed.

A cause had been carried down to trial in 1879, when it was postponed at the instance of the defendants, and a trial took place in 1880, when a verdict was rendered in favour of the plaintiffs, which the Court of Queen's Bench refused to set aside. The defendants, thereupon appealed to this Court, and when the appeal came on to be heard (in 1882) an application was made by the defendants to be allowed to

adduce evidence alleged to have been recently discovered, tending to relieve the defendants from liability, which evidence it appeared, consisted mainly of entries in the books of the defendants. The Court being of opinion that proper diligence had not been used by the defendants, as in such case they must have discovered the evidence at a much earlier date, refused the application, with costs.

THIS was an appeal from a judgment of the Court of Queen's Bench, refusing to set aside a verdict which had been rendered by the jury in favour of the plaintiffs. The action had been instituted by Thomas Murray and William Murray against the Canada Central Railway Company, for the recovery of a sum of \$19,597.50, for work and labour performed by the plaintiffs for the defendants, in fencing 15,678 rods on their line of railway, in the township of Westmeath, under a contract entered into by the plaintiffs with the defendants, acting through one A. B. Foster as their agent. The plaintiffs also claimed interest on the amount, from the 1st September, 1876, when it was alleged the work had been completed.

The defendants pleaded (1) never indebted, and (2) payment of all claims before action brought.

The action came on for trial at the Pembroke assizes, in the spring of 1880, before Patterson, J. A., and a jury.

At the trial the defence relied on was, that the work which had been executed by the plaintiffs had been so performed by them for and on the credit of Foster, who was a contractor under the defendants. The only written evidence of the contract was a memorandum, in the following words:

"Renfrew, 6th January, 1876. Memorandum of fencing between Muskrat River east to Renfrew. T. & W. Murray to construct same next spring for C. C. R. R. Co., to be equal to five boards six inches wide, and posts 7 to 8 feet apart, for \$1.25 per rod. Company to furnish cars to distribute lumber.

"T. & W. MURRAY,

"A. B. FOSTER."

The plaintiff Thomas Murray was examined as a witness at the trial, and proved the fact of the work having been executed according to the terms of the above memorandum.

"The work was proceeded with according to contract Foster went to the old country. We completed the contract. We applied to Mr. Chaffee,

he was the secretary-treasurer of the Canada Central Railway Company, for payment and we got orders to go to the credit of our freight account. We got a promise to have certain amounts credited to our account. I spoke to him and said it was hard that we were paying money out for freight and that we ought to get some settlement; he put me off saying he would prefer to wait until Foster returned. I said we should get our freight account allowed. He said it was too bad to do the work and have to pay over money, and he gave us orders all along until Foster got into trouble, and the account was reduced in that way. I have a statement of the payments but I do not remember the particular amounts. (Witness produces memorandum shewing the credit given to the defendants for freight carried over their line, and on account of the work.) Chaffee arranged with the Canada Central for a certain amount to be allowed us in freight. The company did credit us with the amount. We also got some acceptances on account of this work, bills drawn on the company, and which were accepted by them. * * I entered into another contract for fencing. There was part of the fencing not finished and I arranged with Mr. McKinnon to finish it. He (Mr. McKinnon) was superintendent of the road. We did the work this side of the Muskrat, between the Muskrat and the Government road; that has been paid for I think by the company. There is at present a balance due by the company to me on this contract of about \$12,000. I am the senior of our firm. The first contract was in my own name. I was the acting man in this contract. I did not know of his (Foster) being a contractor on the Canada Central Railway. I heard he had a contract. I never took any trouble to define his position with regard to the Canada Central. I looked upon him as the Canada Central. I didn't pay any attention to the reports, he appeared to run the whole concern. * * I supposed the memorandum was sufficient in this case. I didn't think it made any difference whether he signed as General Manager, as long as he was acting as General Manager; that was not discussed. I was dealing with him as manager of the Canada Central and as nobody else. I looked upon him as the Canada Central Railway Company. * * When the work of grading the road from Renfrew to Pembroke was going on, I entered into a contract with him for grading six miles of this end of the line from Pembroke. * *

"Q. The Canada Central did not pay you for that? A. We were paid for it. I do not know whether the Canada Central paid or not. It was they paid for it.

"Q. I say they did not pay you, will you swear they did? A. Foster paid me. He held the same position then. As long as we got the amount we were not very particular to inquire where it came from. The fencing was the next thing after the six miles of grading. We dealt differently with him for the grading. The character of the work was different. As managing director he agreed to furnish cars, &c.

"Q. Did you deal with him any differently in this latter case from the way you dealt with him in the former case? A. Yes.

"Q. In what way? A. In drawing that memorandum I considered whatever doubts there might have been as to the liability of the company

in the former instance, it was settled now. It occurred to me there might be possible trouble, and I drew that so that there would be no doubt as to the liability of the company."

The plaintiff William Murray was also examined as a witness. The effect of his evidence and of the other witnesses appears in the judgment.

The jury found a verdict for the plaintiffs and \$12,218.51 damages, and in answer to certain questions put by the learned Judge, the jury found that, "the plaintiffs when they contracted considered that they were contracting with the company through Foster; and that there is no evidence that the company repudiated the contract till this action was brought; and that the payments made were as money which the company owed, not money they were paying to charge to Foster."

On the 19th of May, in Easter Term, 1880, the defendants moved for and obtained a rule *nisi*, to set aside this verdict and to enter a nonsuit or verdict for the defendants, or for a new trial between the parties.

On the 26th June, 1880, the Court of Queen's Bench discharged the rule, the Chief Justice, who delivered the judgment of the Court, assigning the following reasons for refusing to disturb the verdict which had been rendered :

"This action is brought to recover for the value of fencing done along defendants' line of road.

"The defence is, that plaintiffs executed the work for and on the credit of Mr. A. B. Foster, a contractor under defendants.

"The only written evidence of contract is this: (setting forth the memo. printed above.)

"By deed, 16th November, 1871, Foster had contracted with defendants to construct and complete all the grading, drainage, foundations, masonry, stations, station-houses, track laying, sidings, switches, turnouts, turn-tables, and ballasting necessary in the construction of a railway for the transit of locomotive steam engines, and other description of motive power, and of all carriages and waggons drawn or propelled thereby, and in complete readiness for

such transit in a substantial and workmanlike manner, as a single line. * * Such railway works to be done and performed as well and of as good quality, and in all respects in a similar manner to the portion of said C. C. R. already constructed, and according to the plans, sections and drawings to be hereafter made by the supervising engineer.'

"It was strongly urged by defendants at the trial, and before us in term, that the jury should have been told as matter of law that the defendants were not responsible as the contract was made with Foster.

"Nothing is said in the defendants' contract about Foster doing the fencing.

"It was attempted to shew by parol evidence that it was understood that Foster was to do the fencing.

"Mr. Abbott, who had been president of the road, states that no particular stress was laid on the item of fencing, or on any other item of construction: that it was understood Foster should complete the extension without any liability to the company beyond the bonds and stock; this was verbal and perfectly understood and much discussed, &c. The contract, he says, was reduced to writing for the purpose of satisfying the Ontario government in order to obtain a subsidy, by shewing that there really was a contract. Foster was a director of the road, and on the 14th October, 1871, resigned, to enable him to contract.

"In May, 1873, he went through the form of assigning the contract to Haskel, and in August, 1873, was elected Vice-President and Managing Director.

"23rd March, 1875, his resignation was accepted as director.

"22nd September, 1875, it was resolved that Foster be paid \$3,000 salary as managing director from 15th August, 1873, to 23rd March, 1875, when he had resigned, and that he be appointed manager of the road from Ottawa to Renfrew village, at \$3,000 salary, to commence from 23rd March, 1875.

"In December, 1875, the company agreed to the transfer of contract from Haskel to Foster.

"The work seems to have been done in 1876.

"Many estimates of this work were given to plaintiffs by Mr. Musson, who signs himself resident engineer C. C. Ry., sometimes headed T. Murray, contractor C. C. Ry.

"The plaintiffs both swore distinctly that they gave credit to and understood they were bargaining with the defendants through Foster, whom they understood was their general manager.

"A great number of drafts were put in evidence, mostly drawn by Foster to plaintiffs' order on the defendants' company, and paid by them; some also were drawn by plaintiffs directly on the company and paid by defendants.

"Large amounts were allowed to the plaintiffs by the defendants for freight bills due by plaintiffs during these transactions, as so much cash. Defendants explain this by saying that they looked upon this merely as so much cash paid by them to Foster on his contract and charged to him in account.

"But this last statement is not clear. At page fifty the present manager says that he cannot find this in the books, but it seems clear that in some shape two thousand dollars was allowed for freight to plaintiffs.

"The extraordinary confusion in which all these matters are involved, and the manner in which these dealings were conducted will appear in the evidence of this witness; how everything, including Foster's hotel bills, &c., were charged as cash to him.

"It appeared in evidence that Foster exercised an overwhelming influence in the management of this company, that he had or controlled nine-tenths of the stock, that he elected the directors as he pleased, that he was both in name and in fact the general manager; and whether nominally off the direction, while a contractor, or on it, he seems to have done as he pleased in everything, and after he ceased to be managing director, his name continued to be used as such. Shortly after this memorandum with plaintiffs was signed, we find him as general manager receiving \$25,000 of bonds from the town of Pembroke for the road.

"His name was always before the public, and in the language of some of the witnesses, he seemed the head and soul and body of the company, that he ran the whole concern and in fact was the company. One witness, also then a director of the company, said he always looked on Foster as the owner of the road, and he was in fact the manager of the whole thing.

"It is a significant circumstance that Musson, who certifies plaintiffs' work as resident engineer, is sworn by defendants' witness never to have been in defendants' employ, but he supposes he was in Foster's.

"So, also, Chaffee was an officer of the defendants and also secretary to Foster and in his pay. Foster died in the Autumn of 1877.

"We are clearly of opinion that the learned Judge could not have acceded to the defendants' argument, that he should withdraw the case from the jury.

"It was a question of fact that could not have been withdrawn from them and one wholly for their decision.

"On the face of the memorandum, it is true that Foster signs his name without qualification, but the work is professed to be done for the C. C. Railway Company, and the latter are to furnish cars, &c.

"As soon as it appeared that Foster was the person apparently managing all the affairs of the company, the natural inference from this memorandum by itself would be, that he was acting for them in procuring work to be done for them.

"The plaintiffs' evidence was very strong that they gave credit to the defendants and understood that the work was done for them, and that they were not aware that Foster had to do the fencing, or that he was bound to do so by his contract.

"Even if the contract had been before them when the bargain was made, they would not have found in it any provisions for fencing, though many particulars are there inserted.

"It was well known that Railroads were often opened

through sections of country sparsely settled and in running operation before the erection of fences, and under the general law notice was required from the land owners.

"It is not necessary, nor would it be proper, for us in this action to express an opinion whether as between Foster and the Company he was bound to do the fencing.

"On the peculiar state of things disclosed in the evidence, it cannot be matter of surprise that any person making such an agreement as this with Foster might naturally have assumed that he was dealing with the company and on its responsibility.

"The defendants have chosen to have conducted matters in the construction of this railroad in such a way as to create infinite difficulty on the part of the outside world in distinguishing between them and the deceased gentleman, who seems to have been the whole motive power and controlling influence of the enterprise.

"We think the whole question of liability was for the jury.

"It was left to them, and in such manner that the defendants have no cause of complaint.

"It remains only to consider whether we are bound to interfere with the finding of the jury.

"If the plaintiffs really contracted with Foster, and on his liability, it is, of course, unjust that the defendants should be responsible.

"The jury have held that it was not so; that the contract was with the defendants.

"The latter have received the full benefit of the plaintiffs' work in a matter clearly within the ordinary purposes of their incorporation, in the construction and proper equipment and protection of the road. The question before us is not what our individual opinion may be as to the weight of evidence, if it rested on our finding, but whether we are called on to interfere where there was evidence, if believed, sufficient to support the finding.

"The defendants have urged that they finally settled with Foster under the impression that they were not liable for this fencing.

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"The defendants have urged that they finally settled with Foster under the impression that they were not liable for this fencing.

"We find in the document produced that when that settlement was effected it was to be without prejudice to a very large claim on his part against the company for other matters connected with the building of the road. If so, it may be possible that they may still have an opportunity of bringing this matter into account.

"We have conferred with the learned Judge who tried the case, and we are allowed to state that he does not dissent from the opinion that the evidence does not disclose any satisfactory ground for an interference."

The defendants thereupon appealed to this Court, and when the appeal came on for argument on the 14th of June, 1881,*

J. K. Kerr, Q. C., asked permission to adduce further evidence, which was not known to have existed when the cause was argued in the Court below.

After taking time to consider the Court made an order directing the cause to stand over, parties to be at liberty to produce evidence and documents before the County Judge of Renfrew, and this application and the cause to stand over till next sittings of the Court. Costs of the day to be paid by the appellants.

In pursuance of the order drawn up the evidence was taken before the County Judge, and the cause again came on before this Court on the 3rd of February, 1882.*

J. K. Kerr, Q. C., and *W. H. Walker* for the appellants.

Bethune, Q. C., and *Deacon*, Q. C., for the respondents.

On the application to be allowed to put in the evidence which had been taken by the County Judge of Renfrew, *Bethune*, Q. C., objected to its being now received as unreasonably prejudicing the rights of the respondents, and further, that no sufficient ground for the reception of this evidence had been established, as it could all have

* *Present*.—SPRAGGE, C.J. O., BURTON, MORRISON, J.J. A., and OSLER, J.

been put in at the original examination of witnesses had the officers of the defendant company made proper exertions to do so.

February 6, 1882. SPRAGGE, C. J.—Amongst the cases cited from the English reports there are not any of jury trial.

In *Dinsmore v. Shackleton*, 26 C. P. 604, the difficulties where there has been a jury trial are pointed out in the judgment of the Court at page 613: "The 11th section, of the Act referred to gives this Court full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in Court, by affidavit, or by deposition taken before any person whom the Court may direct. It is manifest that there must be some practical difficulty in making use of this power where, as in this case, the trial was by a jury. It may be usefully employed in such a case where by accident or oversight a party has been unable or has failed to prove some fact or document essential to his case, of the existence or authenticity of which there is no reasonable doubt, or no room for serious dispute. But if the proofs desired to be added are in themselves proper subjects for consideration as disputed questions of fact, and the jury have found a general verdict, I do not see how this Court can properly be substituted for the jury, or supplement the verdict by hearing and pronouncing upon further evidence."

In the English cases the Courts have received the evidence in what they conceived to be proper cases, and have refused to do so in others.

In *Jones v. Chennell*, L. R. 8 Ch. D., at 505, the Master of the Rolls treats that point thus: "The next question is, whether there is here a sufficient special reason. It is impossible to lay down *a priori* what will be a sufficient special ground. At the same time my opinion is, that the Court should be very cautious about admitting further evidence, and it is not by any means to be admitted as a mere matter of course, but there should be a strong reason given for admitting it."

In the cases in which further evidence was admitted, the applications appeared to have been made promptly, and the reception of further evidence and the consideration of it with the evidence already given, would, it is to be assumed, occasion no great delay.

From the reports of the English cases. I should say that further evidence would not be admitted in appeal, in cases where a new trial would properly be refused in the Courts of first instance, unless perhaps in cases where prolonged future litigation might be a reason for refusal in Courts of first instance, a reason for a difference which does not apply in this case. The ground would be the discovery of new evidence or surprise.

The former of these is the ground here, and in such cases I apprehend that a Court of Appeal would properly require (as a general rule) all that would be required to be shewn on an application for a new trial.

In *Robinson & Joseph's Digest*, (vol. II., p. 2554), the rule is thus stated: "The discovery of new corroborative evidence is no ground for a new trial: *Fawcett v. Motherwell*, 14 C. P. 104; *Hooper v. Christoe*, 14 C. P. 117; *Regina v. McIlroy*, 15 C. P. 116; *McDermott v. Ireson*, 38 Q. B. 1.

* * A new trial will not be granted if the evidence was known before, though too late to make use of it at the trial, and though every reasonable effort was made to produce it after it was so discovered: *Rowe v. Grand Trunk R. W. Co.*, 16 C. P. 500."

And there is the familiar rule, that it must be shewn that the evidence could not with reasonable diligence have been discovered, and have been given before.

Mr. Walker's affidavit is very indefinite. It does not fulfil the conditions stated in the passage from *Robinson & Joseph's Digest*, and I must add that he does not appear to have afforded to the solicitors of the plaintiffs such facilities for testing the accuracy of his statements—statements, too, only as to his belief—as, considering that his clients were applicants for a great indulgence, it became him to do.

Then what is discovered? First, entries in the appellants' own books. Assume that these entries were unknown to the individuals now composing the defendant company, they knew the date of the transactions, and if diligent, thoughtful, and vigilant as they should have been, they would have examined the books for entries which they say now have been discovered by accident.

There was, too, an absence of diligence in not examining the plaintiffs. They might have obtained from them the information which they now profess to have discovered, or at least a clue to it. But what the information is, what these entries shew, is not disclosed to us with that clearness and fulness with which they ought to be shewn.

The discovery said to be recently made of the statement of assets, and how the present claim is therein stated, loses much of its force from the circumstance, pointed out by my brother Osler on the application, that that statement was made during the pendency of this suit.

The application is met with the further difficulty, that the discovery of new corroborative evidence is not ground for new trial.

Is this corroborative evidence? I am not myself quite clear that it is so.

There has been a long pending litigation in this case. The case was first carried down to trial in 1879; the trial then postponed upon the application of the defendants, then a trial of the case in 1880, and application for a new trial.

If any relief be granted upon this application, it could be no other than a new trial; that might take place next Spring, or it might be the Autumn. There may be an application for a new trial and an appeal from the decision upon that application. So that if new evidence be admitted, it may involve another year's litigation. I refer to the past litigation not only upon the question of delay and its evils, but also upon the question of diligence. The issue is a short and simple one. In 1879, the defendants knew the plaintiffs' case, and might have known or at least sur-

misled the evidence by which they might have to support it. After the postponement they should have worked with redoubled diligence to prepare their own case ; they had a year in which to do this, then came the trial and a verdict against them. The trial must have shewn them the plaintiffs' case, an advantage of which they might have availed themselves when applying for a new trial.

After all the time that has elapsed, and after all that has occurred, we feel that though it might possibly be in furtherance of justice in this particular case to grant the defendants' application, it would open the door to protracted litigation, and be an unwise departure from settled rules in the cognate practice in case of new trials ; and especially ought we not to grant it upon the material before us.

The application is therefore refused, with costs,

The argument of the appeal was then proceeded with : the same counsel appearing for the parties respectively.

The grounds relied on appear sufficiently in the judgment.

September 25th, 1882. SPRAGGE, C. J. O.—I have had the advantage of seeing, and I have carefully perused and considered the critical examination of the evidence, oral and documentary, prepared by my brother Burton. I have myself carefully read the evidence, and I should discuss it much more fully than I propose to do, if the task had not already been performed by my learned brother.

If the contract for fencing made by the short memorandum of 6th January, 1876, between the plaintiffs and Foster had expressed ever so distinctly that it was entered into by Foster on behalf of the defendants' company, it would establish the plaintiffs' case only to this extent, that Foster professed to act and that they understood him to be acting on behalf of the company ; and it is difficult to see how, with the knowledge of facts the plaintiffs had, they could have accepted as true any statement by Foster that he had the authority of the company to enter into such a contract. They understood perfectly well the difference between the Canada Central Railway Company and the

Extension Company; and, having taken from him a contract for grading on the line of the latter, a contract entered into with him as contractor, for its construction, they knew that he could not be, as in fact he was not, manager or managing director of the extension line.

The real facts of the case, apart from assumptions and supposed representations at the time of this contract, were shortly these. The defendants are a railway company, a corporation duly constituted with a president, board of directors, secretary-treasurer, and manager or managing director; Foster being at one time the one, at another time the other; having, when the latter, a seat at the board. His position did not *in law* differ from that of any other director, except when he was also manager or managing director, and differed in fact only from the position of others, from the circumstance of his holding so large a number of shares and proxies as to enable him virtually to appoint the directorate and other officials of the company; but he had no more authority in law to bind the company by his contract than if, instead of having or having control of nine-tenths of the shares, he had only one-tenth.

At the date of the contract with the plaintiffs, Foster was manager of the road from Ottawa to Renfrew. Between Renfrew and Pembroke was the extension; and that was not, at that date, in the hands of the company. Foster was at that date manager of the line east of Renfrew, which had been already constructed and was in operation; and he was not manager of the proposed line west of Renfrew; but held a position wholly incompatible with that of manager; his position being that of contractor for its construction. It is unnecessary to inquire whether if he had been manager he could have bound the company by a contract for fencing. I think it at least doubtful; but this fencing was on a line where he was not manager, and where he had no authority whatever, other than in his character of contractor, and it is immaterial upon the question at issue between the parties to this suit, whether

as between Foster as contractor and the company he was to build the fencing in question. It seems to have been assumed and understood between them that he was to build it; but if he was not, that circumstance would not give validity to a contract between him and the plaintiffs to bind the company if the contract had purported ever so expressly to bind the company.

These considerations appear to me to lead inevitably to the conclusion that it is wholly immaterial what the plaintiffs thought or understood: that therefore it should not have been put to the jury as one of the questions which they had to decide, whether the parties when the agreement of January, 1876 was made, supposed that it was a contract with a corporation, or that they were dealing with Foster. In another passage it was put, "what did these parties think at the time?" What follows is no doubt correct, that if the jury were not satisfied that the plaintiffs in their own minds did not understand that they were dealing with the company, they must fail; and that if they did so understand, that would not of itself entitle them to recover, as they would have to shew further that Foster's act was adopted by the company.

The jury were also told this, "though Foster was not the agent of the company to make this contract, yet, if he professed to be acting for the company and working in the company's name, it would be binding on the company, unless the company repudiated." The report adds, "or accepted it," which I take to be a mistake. "If they repudiated it they would not be bound, if they adopted it, it would bind them," and it was put to the jury as a point for their decision. "Had the company adopted Foster's act either by paying money or allowing freight."

What I think wrong in the charge was putting it to the jury as a question for their decision what the plaintiffs thought or understood. Putting it as a question for them to decide, was telling them that it was a material fact in the case. I think the charge also wrong in telling the jury that if Foster professed to act for the company, the

company would be bound unless they repudiated the act—wrong for this reason, if for no other, that if Foster as between himself and the company was the party to make the fence, the company would not be bound to pay the plaintiffs even though they did not repudiate, whatever Foster may have professed when the contract was made. An adoption by them would have been a different thing, but then the jury should not have been told that paying moneys or allowing freight were *per se* acts of adoption.

The effect of the case going to the jury in the way in which it was put to them by the learned Judge, is apparent from their answers to the questions put to them. This may be divided into two parts. One the making of the contract itself. Upon that the jury say: "The plaintiffs when they contracted considered that they were contracting with the company through Foster," a point which is, in my opinion, wholly immaterial, being found as it is for the plaintiffs, though if found the other way it might be material against them. The second part of the finding is, "that there is no evidence that the company repudiated the contract till this action was brought, and that the payments made were as payments which the company owed, not money they were paying to charge Foster."

There is certainly much in the learned Judge's charge that is unquestionably correct; but I think it erroneous in the respects that I have pointed out; and that these errors in the charge contributed largely to the verdict, I think an erroneous one, which the jury has pronounced.

A very material part of the case remains to be considered, viz., was there any evidence to go to the jury upon which they could find a verdict for the plaintiffs, any evidence, that is, in the common sense meaning now attached to the words in the language of Maule, J., in *Jewell v. Parr*, 13 C. B. 916: "When we say that there is no evidence to go to a jury, we do not mean that there is literally none; but that there is none which ought reasonably to satisfy a jury that the fact sought to be proved is established."

Upon the first branch of the case the jury find only (in

answer to the questions) that the plaintiffs, when they contracted, "considered that they were contracting with the company through Foster." They do not find as a fact that Foster had authority from the company to make the contract on their behalf. The Judge's charge was against such a finding, and there was no evidence which could satisfy reasonable men that Foster had such authority, or that he professed to have such authority. And looking at the evidence of the plaintiffs themselves there is no evidence that he represented to them that he had any authority derived from the company as a corporate body. There is abundant evidence of the light in which they regarded him. Mr. Murray looked upon him as the Canada Central Railway Company. He did not ask him his position, or talk about it. He never doubted but that the matter was all right. And one of them says that he looked upon him as the head, body, and soul of the company. He had, and they knew that he had, a preponderating influence in the company at that time. Hence the unbounded confidence, which their own evidence shews, that they had in him personally. But it was all *personal* confidence. What they knew negatived the idea that he had, *quoad* that fencing, any right to make a contract binding on the company, either as managing director or otherwise.

The evidence being what it was, the learned Judge should, in my opinion, have told the jury that there was no evidence upon which they could find that there was a contract between the plaintiffs and the railway company for the making of the fencing in question; and this leaves open only the other question, whether there has been what has been called an adoption of the contract entered into by Foster.

I agree with my brother Burton that there could not be a ratification of the contract by the defendants unless it had been professedly entered into by Foster on behalf of the company. It may be that the company might adopt as their own a contract entered into by Foster in his own name, rather in the nature of a novation than a ratification.

That, however, is not very material, inasmuch as we see what was pointed at by the learned Judge in his charge, and what the jury understood. My brother Burton has shewn what were the facts in relation to these alleged payments and the allowances for freight. It is clear that they may be attributable to the fact of moneys being payable by the company to Foster on one account, viz., as contractor on the extension road, while moneys were payable by Foster individually to the plaintiffs for fencing, and moneys were payable by the plaintiffs to the company for freight. It would be an ordinary matter of business in such a state of things for the company to pay money to the plaintiffs at the request of Foster, and charge the amount paid to Foster; and, instead of exacting payment of freight from the plaintiffs, to charge it to Foster and acquit the plaintiffs from its payment; and this we find is what was done.

These payments and allowances certainly consist quite as well with their being made in the ordinary course of business arising from the relation of the parties being what I have described, as with their being made by way of adoption of a contract to which the company was no party; and that being so, the onus was upon the plaintiffs to shew that they were made by way of adoption of the plaintiffs' contract with Foster. This is very clearly put by Mr. Justice Williams in *Cotton v. Wood*, 8 C. B. N. S. 573. It was an action for negligence; and the learned Judge said: "There is another rule of the law of evidence, which is of the first importance, and is fully established in all the Courts, namely, that where the evidence is equally consistent with either view, with the existence or non-existence of negligence,—it is not competent to the Judge to leave the matter to the jury. The party who affirms negligence has altogether failed to establish it: that is a rule which ought never to be lost sight of." The rule is one of logic and common sense; and is of course not confined to cases of negligence. There is no evidence that these payments and allowances were made with any reference to there

being any liability on the part of the company to pay the plaintiffs anything, or to the adoption by the company of the contract made between Foster and the plaintiffs; and without such evidence it was not competent, as Mr. Justice Williams puts it, to the Judge to leave the matter to the jury.

It would be so in an ordinary case between individuals. There is in this case this further difficulty in the plaintiffs' way, that the defendants are a corporation; and even if the officers of the company managing its financial affairs in such matters as these payments and allowances, had dealt with them as payments and allowances due directly by the company to the plaintiffs in respect of this contract of fencing, it would, I apprehend, be a matter very clearly beyond the scope of their authority as such officers. It would be necessary to shew special authority from the company.

In my view of the case there would, I should incline to think, be no question for the jury, even under the old rule. Under the rule now established I feel more clear in coming to the same conclusion. *Jewell v. Parr*, was followed by the case of *Ryder v. Wombwell*, in the Ex. Ch. L. R. 4 Ex. 32. The case was against an infant for what were alleged to be necessaries suitable to the station in life of the defendant. Mr. Justice Willes, by whom the judgment of the Court was delivered, after observing that such a question is one of mixed law and fact, added. "But there is, in every case, not merely in those arising on a plea of infancy, a preliminary question which is one of law, viz., whether there is any evidence on which the jury could properly find the question for the party on whom the onus of proof lies. If there is not, the Judge ought to withdraw the question from the jury and direct a nonsuit, if the onus is on the plaintiff; or direct a verdict for the plaintiff if the onus is on the defendant. It was formerly considered necessary in all cases to leave the question to the jury if there was any evidence even a *scintilla* in support of the case; but it is now settled that the question for the Judge, subject of

course to review, is as stated by Maule, J., in *Jewell v. Parr*, which I have already quoted. These cases with others were referred to by my brother Burton, in *Howe v. Hamilton and North-Western R. W. Co.*, in this Court, 3 App. R. 344.

It has occurred to me whether the plaintiffs' case could be sustained on the ground of executed consideration. The point is not taken in the reasons against the appeal, and was only mentioned, not argued in this Court. I do not think the case can be supported on that ground. I had occasion to consider the question, and I discussed it at some length in *The Hamilton and Port Dover R. W. Co. v. The Gore Bank*, 20 Gr. at p. 196, *et seq.*, and have seen no reason to change the opinion that I then expressed. The case before us upon the whole of the evidence seems to be analogous to the case of a sub-contractor of a house or other erection on a man's land who has executed work, upon a contract with the contractor. The owner having afterwards possession and enjoyment, could not bring the case within those bearing upon the question of executed consideration, and certainly there is no dishonesty—the ground upon which some of these cases are rested—in refusing payment to the sub-contractor where, as in this case, the contractor is the debtor of the owner.

In my opinion there should have been a nonsuit.

BURTON, J. A.—The only two questions that are open upon this appeal are :—

1st. Whether there was any evidence or any sufficient evidence of any contract with the defendants, either originally or by ratification and adoption subsequently. If not the plaintiffs should have been nonsuited. Or,

2nd. Whether there should be a new trial on the ground of misdirection on the part of the learned Judge in submitting to the jury whether the plaintiffs supposed they were dealing with the defendants, or in not holding as a matter of law that the written contract produced was one between the plaintiffs and Foster.

The learned Judge held, and I think properly held, that there was no evidence shewing that Foster had any authority to make the contract on the part of the company.

The fact appears to be that Foster was appointed manager, not over the portion of the line that was under construction, but over that portion which had been constructed and was being operated. Over the portion then under construction he had in point of fact no authority as an official of the company, but was a contractor under them for its construction. The question of liability, therefore, must depend upon whether there is any evidence of conduct on the part of the company subsequently which would in law amount to a ratification, and to establish this it would be necessary for the plaintiffs to shew that Foster professed to act on their behalf, though without authority, and that with that knowledge they adopted it.

And now we come to a portion of the learned Judge's charge to which exception has been taken.

He says, though Foster was not the agent of the company to make this contract, yet if he professed to be acting for the company and working in the company's name, it would be binding on the company unless the company repudiated or accepted it (*sic.* in the report). If they repudiated they would not be bound; if they adopted it it would bind them.

The learned Judge meant, no doubt, if the company, with the knowledge that Foster was so acting as their agent, did not repudiate, or with the like knowledge accepted the work, but he did not so express himself in his charge, and in no portion of the charge, nor in the questions which were submitted to and answered by the jury, are they told that this was essential.

Now if, as the learned Judge has assumed, Foster had no authority to bind the company by this contract, and did not in point of fact assume to bind them, it is manifest that the company would not be bound whatever might have been the supposition of the plaintiffs as to whom they were contracting with.

Nor would the company be bound, notwithstanding that the agent assumed to bind them, unless, with the knowledge that he so assumed to act, the company adopted as their own that which originally the agent had no power to do on their behalf.

It is scarcely necessary to say that the mere acceptance of the work could in no sense *per se* be regarded as an adoption of the contract. *Non constat* that the company may not have already paid Foster for that of which it is claimed they are deriving the benefit.

The first step therefore in establishing the liability of the company, by ratification, is, to shew that Foster, when making this contract, professed to act for the company. Is there any evidence from first to last that he did so profess to act? I confess I am unable to find any.

In *Sanderson v. Griffith*, 5 B. & C. 909, where an agent in a written agreement professed to contract on behalf of a married woman, it was held that the husband could not by subsequent ratification acquire any right under it, because he was not named as the party for whom the agent professed to act.

And in the same way there can be no ratification of a forgery, because the forger did not profess to sign by the authority of the party whose name is forged, but professed that the signature was that of the party himself: *Brook v. Hook*, L. R. 6 Ex. 89.

The matter seems to me to assume this shape. The plaintiffs enter into a contract which they might imagine (I am very far from being convinced that they did), was made with the company. There is no evidence that Foster had any authority to act for this company. All the evidence there is upon the subject is the other way. Can the shareholders then in this company be made responsible from the mere circumstance that the company have taken over and are using the road, and have the benefit of the plaintiffs' work?

There can be but one answer to such a question, and what is there to carry the case beyond that? The pay-

ment of the charges for freight is relied on, but that payment is quite consistent with the assumption that Foster was the contractor and the plaintiffs his subcontractors. The witness who is asked about these payments says: "There were allowances made by the company for freight paid by the plaintiffs in payment of their account. These allowances were debited to Mr. Foster and settled by him." So that in effect they do not vary from the other payments made, which were usually made by drafts of A. B. Foster in his individual, not his official, character, upon the railway in favour of the plaintiffs, with directions to charge the same, not to their but to his own account. There was one draft direct upon the company from the plaintiffs; but this was shewn to be a renewal of a draft so given by Foster in their favour.

Then again it is said that the contract between Foster and the company did not in terms include fencing. It was shewn in evidence that this contract was prepared hurriedly, for the purpose of satisfying the Ontario Government that the railway company were actually in a position to complete the road, so as to entitle themselves to a subsidy, and that the details therefore were not so carefully gone into as they otherwise might have been—as this was not intended to be the actual contract between the parties; and evidence was given that the contract was to complete the entire work without any liability on the part of the company, beyond the bonds and stock referred to in the separate contract, and that "the understanding was clear and unmistakable on both sides that he was to do everything that was necessary to complete the railway for use," and that this was done for the purpose of removing the objections of the English shareholders to allow the extension to be proceeded with.

But assuming that even as between these parties this evidence was not receivable, and the true construction of the contract to be that the fences were not included in it, to what extent does it assist the plaintiffs? They knew nothing of it. It is not pretended that either

Foster or the company were aware of the omission, or that any such construction had been placed upon it at the time the contract with the plaintiffs was entered into.

If it had been known to the plaintiffs it might have strengthened their impression that they were entering into a contract with the company, but it would not alter the fact that Foster had no authority in fact, and did not either in the contract or in any representation to the plaintiffs assume to bind the company; and in this connection it is as well to refer to the evidence of Mr. Thomas Murray. He had contracted previously to this with Foster for grading a portion of the line from Renfrew to Pembroke. His replies as to the payment for this are somewhat disingenuous. When asked whether the Canada Central paid for that, he answered. "We were paid for it. I do not know whether the Canada Central paid or not. It was they paid for it," but on being further pressed admitted that Foster paid. He further admitted that Foster held the same position then—and adds, what is no doubt true, and may indicate possibly the reason why the defendants have now been selected as the parties with whom they contracted: "As long as we got the amount we were not very particular to inquire where it came from." And now comes the portion of the evidence which I think tends strongly to shew that, although Mr. Murray intended to have two strings to his bow, he must have known perfectly that the party with whom he was contracting assumed only to bind himself and not the company.

He knew that on the first occasion Foster was a contractor; he says when he entered into the contract now in question he held the same position, and knowing that, what does he say he did? "In drawing the memorandum," he says, "I considered that whatever doubts there might have been as to the liability of the company in the former instance, it was settled now. It occurred to me there might be possible trouble, and I drew that, so that there could be no doubt as to the liability of the company," meaning the insertion of the words "for the Canada Central

4. "The extraordinary confusion in which all these matters are involved, and the manner in which these dealings were conducted, will appear in the evidence of this witness; how everything, including Foster's hotel bills, &c., were charged as cash to him.

5. "It appeared in evidence that Foster exercised an overwhelming influence in the management of this company; that he had or controlled nine-tenths of the stock; that he elected the directors (p. 60) as he pleased; that he was both in name and in fact the general manager, and whether nominally off the direction, while a contractor, or on it, he seems to have done as he pleased in everything, and after he ceased to be managing director his name continued to be used as such. Shortly after this memorandum with plaintiffs was signed we find him as general manager receiving \$25,000 of bonds from the town of Pembroke for the road.

6. "His name was always before the public, and in the language of some of the witnesses, seemed the head and soul and body of the company; that he ran the whole concern, and in fact was the company. One witness, also then a director of the company, said he always looked on Foster as the owner of the road, and he was in fact the manager of the whole thing.

7. "It is a significant circumstance that Musson, who certifies plaintiffs' work as resident engineer, is sworn by defendants' witness never to have been in defendants' employ, but he supposes he was in Foster's.

8. "So, also, Chaffee was an officer of the defendants, and also secretary to Foster and in his pay.

"Foster died in the autumn of 1877.

"We are clearly of opinion that the learned Judge could not have acceded to defendants' argument that he should withdraw the case from the jury.

"It was a question of fact that could not have been withdrawn from them, and one wholly for their decision.

9. "On the face of the memorandum, it is true that Foster signs his name without qualification, but the work is professed to be done for the Canada Central Railway Company, and the latter are to furnish cars, &c.

"As soon as it appeared that Foster was the person apparently managing all the affairs of the company, the natural inference from this memorandum by itself would be that he was acting for them in procuring work to be done for them.

"The plaintiffs' evidence was very strong that they gave credit to the defendants, and understood that the work was done for them, and that they were not aware that Foster had to do the fencing, or that he was bound to do so by his contract.

10. "Even if the contract had been before them when the bargain was made, they would not have found in it any provisions for fencing, though many particulars are there inserted.

"It was well known that railroads were often opened through sections of country sparsely settled and in running operation before the erection of fences, and under the general law notice was required from the land owners.

"It is not necessary, nor would it be proper, for us in this action, to

express an opinion whether as between Foster and the company he was bound to do the fencing.

11. "On the peculiar state of things disclosed in the evidence, it cannot be matter of surprise that any person making such an agreement as this with Foster might naturally have assumed that he was dealing with the company and on its responsibility.

12. "The defendants have chosen to have conducted matters in the construction of this railroad in such a way as to create infinite difficulty on the part of the outside world in distinguishing between them and the deceased gentleman, who seems to have been the whole motive power and controlling influence of the enterprise.

"We think the whole question of liability was for the jury."

As to No. 1 of these reasons, I have already pointed out that the fact, if true, that the plaintiffs supposed that they were contracting with the company, could be no ground whatever for making the corporation liable, and therefore it was not a fit matter to submit to the jury as a ground for inferring liability.

The evidence is to my mind irresistible, that the plaintiffs knew that Foster was not professing to act for the company; but the erroneous supposition that they were contracting with A., when in fact, they were not, cannot be any reason for making A. liable.

Reason No. 2, is based upon a misapprehension of the facts. All the drafts were drawn by Foster individually in favour of the plaintiffs upon the company, paid by them and charged to Foster, with one exception. In that one case, the company had come under acceptance, were liable therefore to the plaintiffs, and sought an indulgence, and at their request the plaintiffs drew direct for the cash payment and the renewal draft.

Reason No. 3. It is shewn that the plaintiffs complained to Chaffee that it was a hardship that they should not be paid their contract price, and still be called upon to pay freight. He therefore interceded with the company, and what appears to have been done was this. The company instructed their agent not to collect their bills for freight, but they were returned as vouchers and kept by the treasurer as cash until they reached a certain sum—they were then charged to Foster as so much paid to him on account

of his contract, and he charged the same sums against his sub-contractor the plaintiffs; in no other way did the plaintiffs pay this freight. In no other way did the company receive payment. This is all entirely consistent with the fact that Foster was the contractor—the plaintiffs, his sub-contractors—and quite inconsistent with the plaintiffs' theory.

But even without the explanation how was it a fit matter from which a jury could properly be asked to draw an inference of liability, unless it were first established that Foster had professed to contract on the part of the company?

As explained it does not differ from any other payment. Without the explanation it afforded no evidence on which to make the company liable, although it might serve to confirm the impression of the plaintiffs that they were contracting with the company.

Reason No. 4, is also, in my judgment, based upon a misapprehension of the evidence. Treating the facts in evidence to point to a contract with Foster and a subcontract with the plaintiffs, all this imaginary "confusion" vanishes; but if this "confusion worse confounded" had been actually proved to exist it would seem a strange ground to submit to a jury for holding the company liable to these plaintiffs. And

Reason No. 5, appears to me to be equally untenable, and to be again based to a certain extent upon a failure properly to apprehend the evidence and a failure to distinguish between Foster's position as manager of a road finished and in operation, and another road not then in existence, and not in the possession of the defendants, but then under construction, and of which he was the contractor.

Foster may or may not have elected the directors, and may have controlled a large portion of the stock of the company; and he may thereby have acquired the power of doing great injustice to his fellow shareholders, but they had this protection at least, that they could only be bound by the acts of their directors.

As manager he could do nothing to bind them out of his proper sphere, and only over the operated road. So far as the extension was concerned he had no more power as the company's agent over it than if it had been a separate railway, entirely distinct from the Canada Central.

Reason No. 6, can scarcely be regarded as a satisfactory one in a Court of justice for fixing a corporation with liability, although with an unskilled juror it might be regarded as eminently satisfactory. The evidence of the witness referred to dispels the common idea that a corporation has neither a body to be kicked nor a soul to be saved; but the shareholders would scarcely deem it reasonable that they should be made responsible because a witness entertained the opinion that this corporation had a vicarious "head, soul, and body," and that that head, soul, and body "ran the whole concern." It is precisely to guard against corporations being held liable by juries on such fanciful grounds as these that a Judge is called upon in every case to decide the preliminary question of whether there is any evidence, and if any, to point out precisely the grounds on which the liability is to be held to be established.

As to Reason 7—If there is any significance in the fact, referred to by the learned Chief Justice, that Musson, who certifies the plaintiffs' work as resident engineer, is sworn not to have been in the defendants' employ, it is this, that it is in itself a very strong circumstance to confirm the view that the contract was with Foster and not with the company. It is to be noted that all these certificates were granted on the one day, 21st September, 1876, are signed by him as engineer, not of the Central Railway, but of the Extension, a road not handed over to the defendants or under their control till the 2nd of October, following; that he was never in the employment of the defendants, but was employed by Foster.

Reason No. 8 would rather point to there being a misapprehension on the part of the learned Judge, as in this reason he refers to Chaffee being both an officer of the company and secretary to Foster.

I have not examined the evidence to see whether at the period of these transactions he occupied the double character, because I do not very well comprehend how it can furnish any evidence to the jury to establish any of the propositions upon which the defendants' liability must depend.

Reasons 9, 10, 11, and 12, are embraced in effect in the other reasons.

I have now gone over all the reasons which the learned Chief Justice gives for arriving at the conclusion that the case could not be withdrawn from the jury.

To say in general terms that the whole question is one for the jury, is, I submit with all deference, an entirely mistaken view of their functions, and of the duty of the Judge. The defendants are entitled to have the Judge's decision as to the grounds on which they can be made liable, and a definition of the issues; and the burden of proof being ascertained, he is to say whether there is any evidence to sustain those issues. As has been often more clearly expressed than I can hope to do, it is of the highest importance that the Judge should restrain a latitude of decision which in many cases would be productive of great injustice, and by reason of that very latitude be left without any means of correction.

The learned Judge at the trial appreciated this, and pointed out that the plaintiffs were entitled to recover, if at all, on the sole ground that the defendants had adopted the contract assumed to be made on their behalf by a person having no authority at the time to make it; and I have endeavoured to point out wherein I think he failed to define what was essential to a valid adoption, and that had he done so he would have convinced himself that there was in point of fact no evidence to sustain an adoption. But the Court in *banc* do not point out how the evidence tends to sustain this ground of liability, but declares that on all these facts together it became a question for the jury.

The plaintiffs had to establish their right to recover upon one or other of these grounds. It was the duty of

the Judge *then*, and it is the duty of this Court now to keep in view the distinct grounds on which, and on which alone, the plaintiffs were entitled to recover, and if the facts proved do not, whatever view can be reasonably taken of them or inference legitimately drawn from them by the jurors, present an hypothesis which would bring the case within either of them, then it was his duty to withdraw them from their consideration, and it is our duty now to do what he should have done, and enter a nonsuit.

I fail, then, to see in any one of the reasons suggested in the judgment of the Queen's Bench any evidence whatever which it was fit to submit to a jury. Assuming the facts to be as stated, what evidence was there to establish any one of the propositions on which the liability must depend? If none, then, to adopt Lord Cairns's language, the Judge has a certain duty to discharge, and varying it so as to make it applicable to a case of this kind, and not to a case of negligence, which he was then considering, for the principle must be the same in all cases, "the Judge has to say whether any facts have been established by evidence from which a liability upon one or other of the grounds contended for *may* be reasonably inferred. The jurors have to say whether, upon those facts, when submitted to them, it *ought* to be": *Metropolitan R. W. Co. v. Jackson*, L. R. 3 App. Ca. at 197.

If I am right in assuming that the facts separately referred to are not of a character from which a liability may be reasonably inferred, they do not collectively do so, and to submit them in that way to a jury is equivalent almost to directing them to find for the plaintiffs.

The shareholders in a corporation are entitled to be protected against claims of this nature, where it was so easy for the plaintiffs to have avoided all misunderstanding by having the contract with the corporation itself. It may be quite true that the company may be enjoying the benefit of the plaintiffs' work, but if this verdict stands, it is quite possible that they will also have the enjoyment of paying for it twice; it in fact appears that Foster was over

paid some \$14,000. Very high authority has recently thrown a doubt upon the liability of a corporation under such circumstances: see remarks of Lord Bramwell, in *Hunt v. Wimbledon Local Board*, L. R. 4 C. P. D. at p. 53. The very learned Judge I allude to says: The "rule I believe exists to some extent though I am not sure that it would be found to exist where the price of the executed contract was of a large amount, if for instance a railway were built for a company at the cost of some hundred thousand pounds. I should not like to say it is decided by the authorities, that in such a case the contractor who had made the railway could recover the price, the Incorporated Company who employed him having given him only a verbal order."

Be that as it may the plaintiffs here ought only to recover on clear proof of original authority in Foster to make the contract on their behalf, or of his professing to have it, and subsequent clear ratification with knowledge of his having so professed to act for the company.

Upon the whole I am of opinion that a nonsuit should be entered, because

1. The Judge at the trial held, and rightly held, that there was no evidence of authority in Foster to bind the company by this contract.

2. Because the evidence equally fails to shew that he professed so to act.

3. That the payment of the freight, which was an ambiguous act, and which might, if unexplained, have been evidence to support the ratification if it had been shewn that Foster originally professed to bind the company, is, in the circumstances of this case, unimportant, as is also the omission in the contract of any reference to the fence.

4. That the other grounds relied on are immaterial, and that there was consequently no evidence fit to submit to a jury to sustain the only ground upon which the company could be made liable.

Whilst adopting therefore Lord O'Hagan's remarks as to the desirability of Courts being very slow to limit the

legitimate authority of juries in relation to corporations, inasmuch as it furnishes in its honest and vigorous exercise the best and sometimes the only protection which the general public possess against their default, short-coming or mismanagement, it is, nevertheless, equally essential to the maintenance and efficiency of the wholesome influence of juries that it should be confined within its fitting sphere and prevented from operating without proper cause, or on insufficient evidence.

Being of opinion that there was no sufficient evidence of a ratification here, I think the judgment below erroneous, and that we should allow this appeal, with costs, and order a nonsuit to be entered.

OSLER, J.—The sole question involved in this appeal is, whether there was any evidence to go to the jury in support of the plaintiffs' case.

The reasons of appeal complain of misdirection on the part of the learned Judge who tried the cause, but this objection was hardly pressed, and is not in my opinion tenable. We have had the advantage of hearing a minute and critical discussion of the evidence on the argument of the appeal, but I think counsel have not succeeded in shewing that the summary of it given in the judgment appealed from is substantially inaccurate.

If the question had been whether the verdict was against the weight of evidence, much might have been urged in support of that contention.

The Court below refused to give effect to it, and it is not a ground on which this Court can now interfere.

I agree with the learned Judge who tried the cause and with the Court appealed from, that the case could not properly have been withdrawn from the jury.

Their verdict was a general one, not entered by the learned Judge upon their answers to the questions asked them after they had delivered their verdict.

It was not improper that they should be asked to consider with whom the plaintiffs believed themselves to be

contracting—with Foster or with the company, for the terms of the written agreement are ambiguous, and if the jury had found against the plaintiffs on this point the defendants must have succeeded. On the other hand, a finding upon it in favour of the plaintiffs would not have been conclusive against the defendants, and the learned Judge did not direct the jury otherwise. It was left to them as an element in the case.

Then, without expressing any opinion whether Foster was, as between himself and the defendants, bound to do the fencing in question, there is no evidence that the plaintiffs knew or believed that he was so bound, and his contract, though specifying with great minuteness and detail the works to be constructed by him, is silent on the point.

The plaintiffs say, and the jury have found, that they did the work on the company's credit, and that they contracted with them and not with Foster. That alone, the jury were told, would not make the defendants liable.

Then, the work having been done on the credit of the company, the jury have found that they adopted it, and that the payments made to the plaintiffs by the allowances for freight, were so made as being due by the company to the plaintiffs for the work in question, and not as moneys which they were paying to charge Foster. That was a fact for the jury, and there was evidence in support of it, of the weight to be attached to which they were the Judges.

The defendants have not convinced me that the unanimous judgment of the Court below is wrong, and therefore, I think the appeal should be dismissed, with costs.

MORRISON, J. A., concurred.

*The Court being equally divided, the judgment
appealed from stood affirmed.**

* Affirmed on appeal to the Supreme Court, 1st May, 1883.

GRAND JUNCTION RAILWAY COMPANY V. MIDLAND RAILWAY COMPANY.

Railway charter, renewal of—Conveyance of land—Descriptio personæ.

The P. & C. L. R. Co., incorporated in 1855, by 18 Vict. ch. 194, had acquired the land in question as part of their road bed. In 1865, its charter expired, the road not having been put in operation. In 1866, 29-30 Vict. ch. 98, was passed, by which the road was to be sold at auction, the Act of Incorporation was revived, and the time for completing the railway extended for five years from the passing of the Act, and there was a further provision for sale under order of the Court of Chancery. Within the five years a conveyance was executed to the defendant company, which took possession, but did not use the land till a short time before the suit. In 1872, the C. P. & M. R. & M. Co. filed a map and book of reference of a proposed extension of their line over the land in question, and constructed part of their road thereon, but ceased in 1873. In 1880, under 43 Vict. ch. 54, O., the C. P. & M. R. & M. Co., leased to the plaintiff company the land in question, and this action was brought to recover possession thereof.

Held, affirming the judgment of the Court below, that the partial construction of their road by C. P. & M. R. & M. Co. in 1872, was an Act of trespass: that the defendant company under the reviving Act and conveyance in pursuance thereof acquired a title to the land: that the power to sell by order of the Court of Chancery was permissive merely: that their right to the land was not forfeited by non-completion of the work on the land within the five years, and therefore that the plaintiff company should not succeed.

The deed to the defendant company described it by its original name of P. H. L. & B. R. Co., when in fact its name had then been changed.

Held, a sufficient *descriptio personæ*, to enable the company to take, though it might not be sufficient to sue in.

THIS was an appeal by the plaintiffs from a decree of the Court of Chancery pronounced by Blake, V. C., whereby it was declared,

"That the defendants the Midland Railway Company of Canada, as assignees of the Peterborough and Chemong Lake Railway Company, are absolutely entitled in fee simple to the lands and premises in question in this cause, that is to say, being the lands formerly owned by the Peterborough and Chemong Lake Railway Company, and lying between Elizabeth street in the village of Ashburnham on the south (except a quarter acre lot owned by the Cobourg, Peterborough and Marmora Railway Company near Elizabeth street,) and the points of divergence of the Cobourg, Peterborough, and Marmora Railway Company from the old line of the said Peterborough and Chemong Lake Railway; and this Court doth and decree the same accordingly."

And it was further ordered,

That a writ of injunction should be awarded to the defendants, the Midland Railway Company of Canada, restraining the plaintiffs, their servants, workmen, or agents from trespassing upon the said lands and

premises, or from interfering with the quiet enjoyment of the same by the defendants, the Midland Railway Company of Canada; and that the plaintiffs should forthwith after service of the said decree deliver up to the defendants, the said Midland Railway Company of Canada, quiet and peaceable possession of the lands and premises in question in the cause.

The appeal came on for argument before this Court on the 7th of June, 1881.*

Hector Cameron, Q. C., and *Moss*, for the appellants.
E. Blake, Q. C., and *W. Cassels*, for the respondents.

Welland v. Buffalo and Lake Huron R. W. Co., 30 U. C. R. 147; 31 U. C. R. 539; *Galt et al. v. Erie and Niagara R. W. Co.*, 19 C. P. 357; *McLean v. Great Western R. W. Co.*, 33 U. C. R. 198; *Clarke v. Grand Trunk R. W. Co.*, 35 U. C. R. 57; *Wilkes v. Gzowski*, 13 U. C. R. 308; *Perks v. Wycombe R. W. Co.*, 3 Giff. 662; *Sedgwick on Statutes*, Maxwell, 376; *Dwarris*, 2nd ed. 528, were referred to.

The facts of the case and the points relied on by counsel appear sufficiently in the judgment.

June 30, 1882. PATTERSON, J. A.—This is a contest between two railway companies respecting the right to the possession and use of a strip of land which formed part of the road bed of another railway called the Peterborough and Chemong Lake Railway.

The claim of the plaintiff company, as set up by the bill of complaint, is under a lease made by the Cobourg, Peterborough, and Marmora Railway and Mining Company, dated the 10th day of July, 1880. The bill alleges that the last named company, being authorized by the Act 35 Vict. c. 59, to extend its railway from its then terminus in the village of Ashburnham to the town of Peterborough, had constructed the line to the town of Peterborough over lands acquired for that purpose; and afterwards had, in pursuance of the Act 43 Vict. c. 54, which authorized the transaction, made the lease to the plaintiffs of the line from

Present.—BURTON, PATTERSON, MORRISON, JJ. A., and CAMERON, J.

Rice Lake to Peterborough; and that the plaintiffs thereupon entered into possession thereof, and expended money, thereupon in preparing and making it ready for use so soon as the plaintiffs' line should have reached the point of junction.

The bill alleges that the defendants have, without the knowledge or consent of the plaintiffs, taken possession of a portion of the line so leased, and have commenced and are laying rails upon it; and prays for an injunction to restrain the defendants from laying down the rails or further trespassing upon the land, and that they may be ordered to give up possession of the land and remove the rails already laid down by them.

The answer admits that in 1872 the Cobourg, Peterborough and Marmora Railway and Mining Company (which, for the sake of brevity, may be referred to as the Cobourg Company,) had laid rails upon the land in dispute, but alleges that that was an act of trespass and without any legal right; and further that that company never completed the line, but, in 1873, abandoned the lands, and had, when the lease was made, neither possession nor legal title. It further sets out, by way of shewing title in the defendants, that the Peterborough and Chemong Lake Railway Company had duly purchased the land in question, and had constructed on it a portion of the main line of its railway, and used it as a portion of its line until 1871, when all its lands, property, franchises, &c., were conveyed to the defendant company by conveyances duly authorized and, executed as required by the statutes in that behalf; and that thenceforward a portion of the Peterborough and Chemong Lake Railway has been in continuous use by the defendants, and that although the particular part now in dispute had not been for some years past in actual use, it had always been the intention to open it up and use it when the financial circumstances of the company permitted.

This is merely an abbreviated statement of the pleadings, which contain other allegations not requiring to be noticed at present.

In my opinion the learned Vice-Chancellor was quite correct in holding that the effect of the deed was to convey the land in question to the defendant company. I do not gather from the evidence that the conveyance was made at a later date than July, 1871. There is something said in Mr. Smith's examination about a second deed executed to correct some inapt statement or expression in the original one. It is not very clear how this was, or when the second deed, if there was one, was executed. If beyond the term of five years from 15th August, 1866, I take it that the property which must have vested under the original deed within the five years, remained in the grantee.

A deed in duplicate has been shewn to us, dated 17th February, 1871, which I take to be the deed in question. One part of it has corrections made in pencil, apparently by way of directions for the preparation of another deed. It may be that it was intended to substitute another deed for this one, which is probably what was in Mr. Smith's mind when he gave his evidence, and that the intention was not carried out. In this deed the grantees are described as the Port Hope, Lindsay, and Beaverton Railway Company, which, in 1871, was incorrect, as the corporate name had been changed to the Midland Railway Company of Canada, in 1869. That error seems to have been the principal thing intended to have been corrected by drawing the new deed. It is clear, however, as I understand the law, that there being no doubt as to what corporation was meant, the description in the deed was a sufficient *descriptio personæ* to make the grant effectual, although the corporation could only have sued in its proper corporate name, and might perhaps have effectually pleaded the inaccuracy if sued under its former title. The rule is thus stated in *Grant on Corporations*, p. 51: "Although it has been laid down that generally a corporation ought to purchase by its name of incorporation, yet it has since been held that, as well a corporation by charter as by Act of Parliament, may take under a devise by another name than that in which they were constituted, there being no

doubt what corporation was meant." And see *University of Cambridge v. The Archbishop of York*, 10 Mod. 207, where it is said: "*Non sequitur* that what will be sufficient to amount to a *descriptio personæ*, to enable a person to take, will be sufficient for him to sue in."

It has been argued, for the plaintiffs, that the incorporation and powers of the Peterborough and Chemong Lake Co. having ceased in 1865, the only power to sell, after the revival of the incorporation in 1866 was under the proceedings authorized by the Act of that year, and we have been referred to several authorities on the subject of the repeal and revival of statutes.

I have examined these authorities, but instructive as they are upon the principles that have to be kept in view, we must after all depend upon the consideration of the terms of the statutes themselves.

The contention is, if I correctly apprehend it, that when the company became effete in 1865 its lands reverted to those persons from whom they had been acquired, and that the revival of the corporate existence, some months later, did not revest them, and that the company had therefore no power to deal with them.

I think this contention loses sight of the proper force of the reviving statute.

The leading enactment is not confined within the limits indicated by the preamble. It revives the corporation and extends for five years the time for the completion of the undertaking. Under this the company could, without selling, have continued the exercise of its corporate powers by completing and working the road. But the privilege thus given would have existed in appearance only, if the revived corporation had neither roadway, lands, nor any other of its former effects. The preamble recognizes the property as belonging at least to the stockholders. It certainly does not treat it as having reverted to its original owners.

The first section, when it provides that nothing in the Act, or in "the Act hereby revived," shall authorize

further calls upon stockholders, treats the revivor as operating upon the special Act itself, and, by the prohibition against resorting to one class of assets, viz., the unpaid stock, brings the other classes within the *maxim expressio unius, &c.*

In the second section the lands, railway, depot, and station grounds, as well as the franchises, are described as those of the company. I take the effect of the Act to be to recognize the continued ownership by the company of its lands and other property, which it authorizes the company, as owner, to use in the prosecution of its undertaking. It does not make a sale imperative, nor does it make it imperative upon the Court of Chancery to direct a sale, although it gives the Court power to do so upon the application of one or more stockholders. It seems to me clear that the company, after the revivor, still owned its former property, and had power to deal with it under its original special Act.

Then the sale having been effected within the extended life of the company, what is the effect of failure by the purchaser to complete the railway within the limited time? If the sale had been under the reviving Act, my impression is, that the purchaser, whether an individual or an association of individuals, incorporated or not, would have stood in the place of the original corporation, as to all limitations and obligations under its special Acts or the Railway Clauses Act. This seems to be the meaning of the provision in section two that the purchaser might proceed to complete the railway under the original Act of incorporation, subject to the proviso in the first section, that is to say, the proviso exempting stockholders from further calls, and of other expressions in the Act, as *e. g.* the running powers given by section 9, over "the line of the said Peterborough and Chemong Lake Railway Company," making no distinction between parts of the line already constructed and those constructed after the sale.

But the actual sale having been under the original Act, I apprehend that the corporation became extinct by being

merged, as it were in that of the purchasing company. The 14th section, already referred to, authorizes arrangements for union, junction, amalgamation, or sale, only with some railway company, not with an individual or unincorporated association; and by declaring that the capital stock shall become the capital stock of the company formed by the union, and be controlled and managed as such, it treats the company as no longer having any separate existence. Therefore I do not see in what way the limitation of the Railway Clauses Act could apply after the sale. The penalty attached to the failure to complete the undertaking within the limited time is the cesser of the incorporation and powers of the company authorized by the special Act to make the railway. That company ceases to exist when the sale or amalgamation takes place, and there is no provision that the purchasing company shall lose its corporate existence or powers by reason of default in completing the purchased or amalgamated line.

But the plaintiffs contend that, even admitting the operation of the conveyance to the defendant company, the Cobourg company acquired a right to the possession under the laws applicable to the acquisition of land by railway companies.

In 1872 the Cobourg company filed a map or plan, and book of reference of the proposed extension of its road from Ashburnham to Chemong Lake, and, in these documents described the land now in dispute as the "abandoned line of the Peterborough and Chemong Lake Railway;" and soon afterwards took possession of the land and constructed part of the projected railway upon it. That work, however, ceased in 1873, and the railway was not further proceeded with. There was, no doubt, a *bonâ fide* intention to proceed when the work was done, but financial or other difficulties caused the project to be given up in 1873, and it was never resumed.

I have not been able to perceive any good reason for saying that the Cobourg company entered upon or occupied the land otherwise than as an act of trespass. Even if it

had been the land of a private owner, the entry would not have been lawful without more being done than is pretended to have been done in this case. The deposit of the map or plan, and book of reference, and the notice of such deposit, were a general notice of the lands which would be required for the railway, and placed the company in a position to make application to the owners or parties entitled to convey, with a view to the making of contracts and taking the other steps to acquire the right to take possession; but did not by itself create any such right: Consol. Stats. C. ch. 66, sec. 11, sub-secs. 5, 6, 20, &c.; R. S. O. ch. 165, sec. 19; sec. 20, sub-sec. 22, &c.

The argument for the plaintiffs has gone the length of contending that a railway company, having taken possession of lands for its roadway, cannot be ejected. I do not understand any case to have settled so extreme a doctrine. There are cases, a number of which have been cited to us, in which acts of acquiescence or license, sometimes shewing only slight and very informal assent, but still going in the direction of proof of license to enter, have been held sufficient to prevent the owner from disturbing the possession or treating the company as a trespasser, and to confine him to his claim for compensation. In this case there was no assent. On the contrary, the president of the Midland road, notified the officers of the Cobourg road not to trespass. There is no case which, under such circumstances as these, would uphold the right of a railway company to maintain the possession.

But there are two other strong facts against the plaintiffs. One is, that this was not the land of a private owner or body corporate, but land already appropriated for railway purposes. I agree with the learned Vice-Chancellor that there had been no abandonment of it by the Midland company, but only a temporary disuse of it. Had there been an abandonment of all design to use it for the purpose of the roadway, the title would of course have remained in the company, although the land might have become subject to expropriation, just

like the lands of an individual owner. I do not understand the plaintiffs to assert more than this, or to contend that the ownership had been lost, but I do not read the evidence as going to this length.

The other fact is, that seven years before the lease to the plaintiffs all idea of using the land for railway purposes seems to have been given up by the Cobourg company, and all occupation and user of the land by that company had ceased. That I take to be the effect of the evidence on this point. Therefore, the ground now put forward as enabling that company, or the plaintiffs as its lessee, to resist an action of ejectment by the owner, has no foundation.

I may be here allowed, as I do not propose to enter into an examination of the cases on the subject, or to discuss the grounds on which they were decided, to say that, in view of the changes in the law since the time when ejectment would only lie where trespass could be brought, I desire to guard myself against being understood to consider that, in circumstances similar to those of some of the earlier cases, the decision which was proper when they were litigated would necessarily be proper now.

On the whole case, I agree with the judgment delivered in the Court below, and think we should dismiss the appeal, with costs.

BURTON, J. A.—I agree in thinking that the judgment below should be affirmed, and this appeal dismissed.

I think it very possible that if upon the expiry of the charter of the Peterborough and Chemong Lake Co. in 1865, the land owners had resumed possession, the revived company might have experienced considerable difficulty in making good their claim to the property. It may be open to question whether, under the circumstances of this case, and in truth the universal practice of railway companies in this country of acquiring not an easement over the land but the fee simple in the land itself, the lands would revert to the landowner on the charter of the company

becoming forfeited. Be that as it may, the possession still remained in the company, and whatever rights or title existed in it upon the expiry of the charter were intended to be vested in the revived company. If on the forfeiture the lands vested in the Crown, they became re-vested in the revived company under the amending Act. If by the effect of the forfeiture the landowners became entitled, they did not assert their rights, and it does not lie in the mouths of the plaintiffs, in my opinion, to assert a title which the parties themselves have not set up.

I think the power to make application to the Court of Chancery for an order to sell was an additional or cumulative power, and was not intended to interfere with or abridge their powers under the original Act, and a sale having taken place under it to the defendants, I do not think that sale can be rendered abortive from the mere circumstance that in the deed executed for the purpose of carrying out the sale, the defendants are not described by their correct corporate name.

The Cobourg and Marmora Company, through whom the plaintiffs claim, certainly never acquired any title. It is not necessary to offer any opinion as to whether land set apart and acquired by one railway for the purposes of its line, but not in actual use, and for many years allowed to lie in that position, can be compulsorily taken by another railway. It is sufficient to say that in this case the preliminary steps were not taken to entitle the Cobourg Company to test that question. They merely filed their plan and book of reference, showing this property as land intended to be taken, but in entering and placing their rails they were mere trespassers, and acquired no title to the land or its possession, and they also subsequently abandoned it.

The plaintiffs by their bill admit that the defendants were in possession at the time of the filing of the bill, and the plaintiffs have failed to shew any title, and upon this short ground I think the bill was properly dismissed.

MORRISON, J. A., concurred.

CAMERON, J.—I concur in the opinion that this appeal should be dismissed, on the ground that the piece of land in dispute became vested in the defendants by the deed to them from the Peterborough and Chemong Lake Railway Company, of the 17th February, 1871, which I think upon the weight of evidence was duly executed, and was authorized by section 14 of the Act of Incorporation of the grantors. The provision in the Act of revival of the Charter 29 & 30 Vict. ch. 98, sec. 2, was not in limitation of the power of the directors to sell under section 14, but to enable any shareholder to apply to the Court of Chancery to order a sale should the directors be unwilling to sell, or if for any other cause a sale under the authority of the Court might be deemed preferable. If the deed had been executed in 1872, as contended for by Mr. Cameron, it would, I think, have been void, as the grantors' powers expired in 1871, and I should not be prepared to hold that under the evidence the plaintiffs had not such a right at the time the defendants entered upon their possession as to entitle them to the injunction sought, although the Cobourg, Peterborough, and Marmora Railway and Mining Company may not have done all that the law required to entitle them to expropriate the land in question. That company had certainly used it for years, and were not the defendants in a position to shew title in themselves, they would not have been in a position to question the right to possession by the plaintiffs by reason of any defect in their title. But the decision of that point is unnecessary in the view I take.

Appeal dismissed, with costs.

IN RE HILL.

Insolvent Act of 1875—Application for discharge—Non-disclosure of causes of insolvency—Defective books.

The insolvent, nine months before his insolvency, stated to the contestant that he had a surplus of \$40,000. When he failed it appeared that there was a deficiency of about that amount, the difference not being satisfactorily, if at all, accounted for. He did not produce all his books, but it was proved that they were kept in such a manner that they would not shew the true state of his affairs. The cash-book had never been balanced, and no balance sheet was ever made out; bills were discounted which did not appear in any of the books, and goods were transferred from his wholesale to his retail place of business without entry in the books that were kept.

Held, reversing the order of the Judge below granting a discharge to the insolvent, 1, that, though an insolvent may be guilty of the offence of not fully, clearly, and truly stating the causes of his insolvency, that is no ground for refusing the discharge, even after a conviction for the offence; 2, that the omission to keep any books prevents the Judge from granting a discharge, whether the intent be fraudulent or not; but 3, when they have been kept, it is not essential, on the one hand, that they should be kept in the most approved form, nor are they sufficient, on the other, however carefully kept in some respects, if they fail to exhibit the insolvent's exact position; 4, that under the facts in this case the insolvent was not entitled to his discharge.

Liberty to the insolvent to renew the application was given, if he should be so advised on his producing the remainder of his books.

Seem, that if an insolvent obtains the consent of the required number of creditors, or the execution of a deed of composition and discharge, he may at once make the application without waiting for the expiration of a year: he is not precluded, however, from applying after the expiration of a year, under the 64th section of the Insolvent Act, (1875.)

THIS was an appeal from the Judge of the County Court of the County of Carleton, sitting in insolvency, under circumstances appearing in the judgment, and came on to be argued before Burton, J. A., on the 28th of May, 1882.

J. K. Kerr, Q. C., and *W. H. Walker*, for the appeal.

Bethune, Q. C., contra.

Hood v. Dodds, 19 Gr. 639; *Re Owens*, 12 Gr. 560; *Bump's Bankruptcy*, pp. 510, 692-3, 700; *Clark on Insurance*, pp. 183-8, 310, 366-7, were referred to.

September 23, 1882. BURTON, J. A.—This is an appeal by a creditor against an order made by the County Court Judge of Carleton granting to the insolvent his discharge under the Act.

On the application to the learned Judge an objection was taken, which has been renewed here, that he had no

jurisdiction to hear the application under sec. 64, inasmuch as the insolvent had obtained from the required proportion of his creditors the execution of a deed of composition and discharge. This objection was overruled by the learned Judge.

My reading of the statute would, speaking of it as a matter of first impression, be that if the insolvent obtains the consent of the required number of creditors, or the execution of the deed of composition and discharge, he may at once make the application without waiting for the expiration of the year, but is not precluded after the expiration of the year from applying under sec. 64; but it is unnecessary to express any opinion upon the point, as the onus was clearly upon the party making the objection to satisfy the Judge that such a deed was executed, and that he has failed to do.

The other objections are of a more serious nature, raising, as the learned Judge remarks, questions of considerable importance under the Insolvent Act. The evidence is very voluminous, and in some respects very unsatisfactory, as in consequence of the absence of a great many of the insolvent's books many of the conclusions drawn from the figures which were used upon the argument are necessarily conjectural.

Before entering upon the merits of the case, however, I think it right to call attention to an error into which the learned Judge has fallen in reference to the conduct of the contestants, one of whom, he assumes, was present at the meeting when the composition was proposed. This was evidently not the case. He was present at the first meeting when the insolvent was examined, that of the 23rd September, but not at the meeting in October, when the composition was proposed.

The learned Judge, acting upon that assumption, thought, not unreasonably, that their conduct was somewhat disingenuous, and it was probably from this impression that he was induced to make the remarks he has done in reference to their letters of 24th and 27th October, 1879.

It does not strike me that they are necessarily open to the construction placed upon them by the learned Judge, although I think it is to be regretted that the writer had not used language which would have placed their meaning beyond the possibility of misconception.

If the creditors were under the *bond fide* belief (and certainly the facts then before them would have warranted that belief), from the circumstances, that they had been told that their debtor's estate was \$40,000 to the good, when it proved, upon the insolvency occurring, about two months afterwards, to be nearly \$40,000 the other way. I say, if they believed that the debt to themselves had been contracted by the insolvent when he had probable cause for believing that he was unable to meet his engagements, with intent to defraud them, whatever may have been the position of other creditors, they might well feel that under the 136th section they could enforce their debt by imprisonment, and in that view there would be nothing illegal in their stipulating for payment in full. It is, as I have said, open to the other interpretation, in which view the remarks of the learned Judge would be none too strong, and the reply made by the insolvent to the letter of the 24th. in which he stated his ignorance of any reason why the contestants should have any different settlement from that made with the other creditors, would seem to call for a different reply to that given, if they based their refusal on the ground of a fraud practised upon themselves, which entitled them to a remedy peculiar to themselves.

The difference between the statement made to these contestants in December, 1878, and repeated substantially in July, 1879, of \$40,000 surplus, to \$40,000 deficiency, within three months subsequently, is certainly startling, and requires a satisfactory explanation, and it is in reference to this explanation that the non-production of the insolvent's books becomes so material; and I may say at once, that under the circumstances of this case I do not share the learned Judge's view that it was incumbent upon these contestants to take steps to procure the attendance

of Mr. Robinson; but it was the bounden duty of the insolvent to clear up the discrepancies if in his power, and to have produced the books, or shewn that every possible effort, including an application to Mr. Robinson, if necessary, had been made to procure them without success. But in truth there is no reason whatever to suppose that Robinson is or ever was in the actual possession of the books, which were handed over to the insolvent by Robinson's directions, and as the evidence shews, and the learned Judge has found, remained in his possession ever since.

I can well understand that loose papers and memoranda, and even a book or two, might be missing, but that such a large number of important books, including all the books at one of the places of business, and a number at the other, should be missing, requires a more satisfactory explanation than the statement of the insolvent, even though under oath, that he does not know what has become of them. It is quite true that their non-production at this stage of the insolvency, and upon the actual circumstances of this case, is not a ground for refusing the discharge, but their unaccountable disappearance is a circumstance of very grave suspicion, and the insolvent cannot be surprised if his statements, unsupported by the corroboration which the books should have afforded, are scrutinized with caution, if not suspicion, and that inferences unfavourable to the insolvent are drawn from the evidence as to the contents of the books which the production of the books might have removed.

I cannot hold upon this evidence, and in the face of the double finding of a jury and the County Court Judge, that the insolvent contracted the debt fraudulently within the meaning of section 136.

I must assume, too, upon the evidence of the insolvent, that he did take stock in December, 1878, and that the result of that stock taking was as he has stated it, shewing an apparent surplus, after making a deduction of \$3,182.70 duties on goods in bond which had been overlooked, of \$35,926.24.

The assets at this time consisted of	
stock	\$49,470 40
Debts	30,055 84
	<hr/>
	\$79,526 24
And his liabilities.....	43,600 00

At the time of the insolvency, in the sworn statement made by the insolvent of his assets and liabilities.

The stock is put down at	\$23,919 28
The debts at	19,268 67
	<hr/>
	\$43,187 95

The debts, leaving out for the present those on account of real estate..... 80,218 05

So that the assets had decreased to the extent of \$36,338.29, whilst the liabilities had increased to the extent of \$36,618.05, making a total difference between the two statements of \$72,956.34.

The insolvent in his affidavit attributes his insolvency to bad debts, depression in business, and shrinkages in the values of stock and assets.

In the statement of assets, not included in the above, he puts down real estate, valued at \$23,938.81, but I have eliminated it, and also claims proved on the estate of \$28,501.54, as not being material to the present inquiry. How then is the insolvent supported in his mode of accounting for this very serious difference occurring in about nine months, or in two months, if the statement made in July is to be considered? As to bad debts, the insolvent himself states that he thought the estimate he made of the debts at the time of the stock-taking in 1878 was fair, and that the total loss of debts between that time and the insolvency was \$5,000. And he places the loss by shrinkages at five per cent., or at most \$2,000.

And the insolvent swears that he believes that the profits paid the expenses of the business between the stock-taking in December and the insolvency.

These are all the matters alleged by the insolvent himself to account for the deficiency.

Some further reasons were urged by his counsel, and referred to by the learned Judge; the first of these is founded upon the circumstance, that certain notes under discount at the time of the stock-taking in 1878 turned out to be bad.

I confess that I find it difficult to understand that argument. I should have supposed that these notes would have been treated as assets, and the debt to the bank as a liability. If in point of fact some of this paper, instead of discharging the liability, came back into the hands of the insolvent and proved bad—he would naturally include that among the losses to which in part he attributes his insolvency. Either that must be so, or the books were not kept in a way to shew the position of the insolvent as the statute contemplates.

In point of fact it appears that the amount of paper under discount at the time of the stock-taking and at the time of the insolvency did not materially differ, but was somewhat less at the later period; but the bank in either case would be creditors for the full amount, although on the realization of the paper the amount to be paid by the insolvent's estate might turn out to be small. The banks are, in other words, creditors holding security. It is not shewn that there was any actual loss beyond the sum of \$5,000 spoken of by the insolvent. There is no positive evidence to shew that any of this paper proved to be bad, or that the paper under discount at the time of the insolvency consisted in whole or in part of the same paper.

I do not understand that the valuation placed by the assignee upon the debts affects the question. The assignee would, I suppose, estimate them with a view to advising the creditors as to a composition, but what the insolvent swore to at the time of the insolvency would be the face value of the debts, although in stock-taking in 1878, in order to shew his position, an allowance would be made, and was in fact made of twenty-five per cent. on the debts at the

Rideau street store. And the reduction of his account at the bank would not reduce his assets although it might cripple him in the means of carrying on his business.

The learned Judge has misapprehended the effect of the evidence as to the real estate when he assumes that it was expected to yield a surplus of \$23,000 over the incumbrances.

The argument of the insolvent's counsel, however, upon that point is fallacious, as although there were claims proved by real estate creditors to the extent of \$4,563 over the assumed value of the land, I have, for the purpose of this computation, struck both the real estate and the creditors in respect of it out of the statement, so as to make a fair comparison with the stock-taking in 1878.

It is sworn by Porter that stock was taken in July, 1879, and there is an entry in the ledger crediting stock with \$36,302.09, of which the insolvent is unable to offer any explanation. Here then we find a discrepancy between the position of the insolvent in December, 1878, and September, 1879, of over \$72,000, and the actual losses from all sources referred to by the insolvent in explanation of it not exceeding, in any view of the evidence, \$20,000.

I do not wonder that the learned Judge felt that the case was surrounded with difficulties. Among other reasons urged against the granting of the discharge is, that the insolvent has not fully, clearly, and truly stated the causes of his insolvency; but although that constitutes an offence for which the insolvent is liable to be indicted, I do not understand that that is a ground for opposing the discharge, even after conviction, although I observe that in the United States a conviction for a misdemeanor under the penal clauses is made a ground for objecting. Nor do I feel that I would be justified, in the face of the learned Judge's remarks upon the manner in which the insolvent passed his examination, in deciding that he was guilty of evasion, prevarication, or false swearing, although there are some portions of his deposition which I feel it very difficult to believe.

I think the only remaining point is, as to the sufficiency of the books which the insolvent is proved to have kept.

It is a most important provision, and is the only one of the several grounds mentioned in the statute for opposing a discharge in which the intent is immaterial. The omission to keep them at all prevents the Judge granting a discharge whether the intent was fraudulent or not. Here the insolvent did keep books. The question is, whether they were properly kept? It is not essential, on the one hand, that they should be kept in the most approved form, nor are they sufficient, on the other, however carefully kept in some respects, if they fail to exhibit to the creditors of the insolvent when an investigation becomes necessary his exact position, so that they may ascertain the true state of his affairs, and whether everything has been fair and honest on his part.

Whether they have been so kept is a question of fact, differing according to the circumstances of each case. In the case of a small business much less might be required than in one of a larger extent. The insolvent in the present case carried on two extensive establishments, one a wholesale, the other a retail one, and did a large business, and the deficiency, as I have pointed out, during a very short period is startling, without any satisfactory explanation, and if books had been kept, as in such establishments they should have been kept, and had been produced, we should not be left to grope in the dark as to the facts as we have been in the present case. It is manifest that, whether the statements of Porter and McLeod are strictly to be relied on or not, the insolvent is placed in a dilemma as to what occurred in July when the extension was asked for. They state that stock was taken then, shewing a result not materially different from that in 1878. If that be true, how is the subsequent deficiency to be accounted for? If it was not taken, the insolvent was not justified in making the statement to his creditors which he is represented to have made on that occasion.

The remarks of the commissioner in delivering judg-

ment in *Re Warburton*, 20 L. T. N. S. 235, appear to me to be entitled to much weight.

"No books," he says, "are satisfactorily kept or can be called proper books of account unless the accounts are entered up in consecutive order, and unless they are regularly balanced from time to time, so that at any time the real state of a trader's affairs may at once appear, and so that in the event of bankruptcy he may be in a condition to make that full and true disclosure of his affairs to the Court and his creditors which the law requires at his hands."

McLeod states that the cash book was never balanced: that no balance sheet was made out while he was there, and whatever weight may or may not be attributable to his evidence, it is quite clear from an inspection of such of the books themselves as have been produced that they were very imperfectly kept, and in his own account and that of McLeod no sums are credited as the salaries to which they were entitled, and according to his statement of the amount of his own salary, his account was greatly overdrawn.

I agree with the conclusion arrived at by the learned Judge that "it is perfectly plain that no one could," in the condition in which those books were, in a few days take stock so as to shew correctly the financial condition of the insolvent; but the evidence has on the whole satisfied me that it was impossible, from the books themselves, to make up a statement that would indicate his true position: that bills were discounted which did not appear in any of the books, and that the manner in which goods were transferred without entry of any kind from one establishment to the other precluded the possibility of making up such a statement.

Where it is apparent that the conduct of the insolvent has been fair throughout, and there is no reasonable suspicion or doubt of his having made a full disclosure of his estate, it would be a harsh rule absolutely to refuse his discharge in consequence of his books being in some res-

pects defective, but in a case like the present where so large a deficiency remains to be accounted for, the creditors are, I think, entitled to be protected by a rigid application of the rule. It is manifest that these books were not kept in a manner to enable either the insolvent or a creditor from their inspection merely to ascertain the true position of his affairs, and their non-production has under the circumstances a most suspicious aspect. I feel that the insolvent law would be a dead letter, if under the facts here disclosed, the Court were to fail to give effect to the objection.

I hold therefore that the appeal must be allowed and the discharge refused, but I reserve the right to the insolvent to renew the application if the books should hereafter be found, and he should be so advised.

Appeal allowed.

BEAVIS V. MAGUIRE ET UX.

Conveyance for value—Hindering creditors—13 Eliz., ch. 5.

The male defendant mortgaged his property several times, and finally sold the equity of redemption. His wife barred her dower in each mortgage, under an agreement with her husband, made on the first occasion, that he would convey other property to her. Upon this claim being reiterated on the sale of the equity of redemption, and the refusal of the wife to join in the conveyance unless the promise of the husband was fulfilled, the husband conveyed other land to a trustee for her. The effect was that the plaintiff, a creditor of the husband, was delayed and hindered in recovering his debt.

Held, affirming the decision of the Court below, that the conveyance to the wife's trustee, was not voluntary; and as the transaction had been found to have been *bond fide*, and without intent to defraud creditors, it could not be impeached under 13 Eliz. ch. 5.

THIS was an appeal from a decree of the Court of Chancery pronounced by Proudfoot, V. C.

The bill in the Court below was filed by John Beavis of the city of Philadelphia in the state of Pennsylvania, setting forth, amongst other things, that in October, 1878, he had recovered judgment against the defendant John Maguire, for \$975.45 damages and costs, upon which he had sued out execution, under which, however, the sheriff had been unable to make any portion of the claim.

The bill further stated that Maguire was the owner of lot No. 11, in the 15th concession of Seymour, in the county of Northumberland (38 acres) valued at \$1.300; and that in consideration of his wife, the defendant Ellen Maguire, joining in a conveyance of certain lands of her husband situate in the township of Otonabee, he had agreed to convey the lands in Seymour to one Wood in trust for her, and in pursuance of such agreement they were conveyed to Wood by a conveyance dated the 1st December, 1877.

The bill then went on to allege:—

“ 6. That by deed bearing date the 11th, day of December, A.D. 1877, and made between the said Robert Edwin Wood, of the first part, and the said defendant Ellen Maguire of the second part, the said Robert Edwin Wood, after reciting the conveyance in the next preceding paragraph of this Bill set out, and a request from the said defendant Ellen Maguire, granted and conveyed the said lands to the said defendant Ellen Maguire in fee simple; both said deeds having been registered in the Registry Office in that behalf; the said defendant Ellen Maguire is now the apparent owner of the said lands.

"7. * * The plaintiff charges and shews the facts to be that the said deeds were both in fact executed on the same day ; that the said defendant John Maguire has used and occupied the lands comprised therein in the same manner as theretofore, and continues to do so ; that at the time of the execution thereof the said lands in the Township of Otonabee were subject to mortgages for large sums, created by the said defendant John Maguire in which the defendant Ellen Maguire had barred her right to dower ; that the said conveyance to the said Wood, for the benefit of the said defendant Ellen Maguire, was without any adequate value or consideration, and was made for the purpose of hindering, delaying, defeating, and defrauding the plaintiff and the other creditors of the said defendant John Maguire.

"8. * * The plaintiff submits that he is entitled to have the deeds of the 1st day of December and of the 11th day of December, A.D., 1877, declared to be fraudulent and void as against him ; and the plaintiff further submits that, under the circumstances above set out, the defendant Ellen Maguire should be declared to be barred of all right of dower in the lands comprised in the said deeds."

The prayer of the bill was in accordance with these statements.

The defendants put in a joint and several answer, alleging that the lands in the township of Otonabee were in or about November, 1877, agreed to be sold by Maguire to one Jackson, for \$7,700 ; and that the defendant Ellen being entitled to an inchoate right to dower therein, refused to bar her said right, unless paid or secured the value thereof ; and that thereupon the conveyance of the 1st day of December, 1877, was executed in good faith.

The cause came on for hearing at the sittings of the Court at Peterborough, in the Spring of 1881.

The defendants were both examined as witnesses, and both swore that the transaction impeached had been entered into in good faith, and that Mrs. Maguire had refused to execute the deed to Jackson, of the Otonabee lands, until prevailed upon to do so at the instance of her brother, who promised if she did so to assist Maguire in putting up a house upon the Seymour lot, which Maguire swore was worth about \$7 an acre ; and that the sale of these Otonabee lands had been determined upon with a view of paying off all Maguire's debts ; Mrs. Maguire swearing that she understood it would discharge all his debts " and

furthermore if I signed off my dower, Hatton (plaintiff's solicitor) told me he would have enough to pay off the \$400 mortgage, and \$300 left for paying debts."

It was also shewn that on several previous occasions, when Maguire required his wife to join in mortgaging the same lands for the purpose of barring dower, she had refused to do so until promised to be paid therefor by a transfer of these Seymour lands.

At the conclusion of the case.

PROUDFOOT V.C.—In this case I do not mean to over-rule any cases, or to endeavour to over-rule any cases. I shall try and steer my way among them, leaving them all untouched, and try to reach a conclusion that will bear investigation.

In the first instance, I may say that there is no question of actual fraud to be considered in this case. No one could listen to the examination of the husband and wife without being satisfied that they were honest in the transaction, or that it was one that was for the benefit of their creditors, and one that they thought they were justified in making, so that I exonerate them from any fraudulent intention or fraudulent motive.

Now there are two grounds upon which it is attacked: one, that it is voluntary, the other, that it was fraudulent; and it is defended upon the ground that there was an antecedent promise to give the mortgage in consideration of the bar of dower, and that it was not fraudulent. Now I think that there was a good consideration for this deed. *Forrest v. Laycock*, 18 Gr. 611, entirely justifies that conclusion. In that case, as in this, there was no question of fraud. In that case, as in this, the parties thought it was necessary to get the wife to bar her dower, because the solicitors both of the vendor and the vendee thought it necessary that the wife should be a party, and Mr. Hatton tells us he made her a party as a matter of course, and Mr. Roger says that he would have required her to be a party if he had thought about it at all, or if

the question had been raised. So that all parties were under the impression that she was a necessary party. I think I would have thought that she was not a necessary party, and would not have thought it essential that she should join in the conveyance. And the Judges in Appeal who have come to that conclusion, and have formulated it in judgments, in their actual practice, I know, required the wives in such cases to be parties to the conveyance, so that I think it is brought within the principle of *Forrest v. Laycock*,—that all parties considered it advisable to have the wife a party, and being under that impression that the promise was made to the wife to give her this property. But it does not rest there, for I think the evidence justifies me in coming to the conclusion that I do come to—that there was an antecedent promise made by the husband to the wife before there was a mortgage upon the property, at a time when she therefore had an inchoate right of dower, and one that would clearly become a consideration for the promise that was made and for the property that was given afterwards in pursuance of that promise.

The rule laid down in *Merchants' Bank v. Clarke*, 18 Gr. 594, is not a statutory rule. It is a rule of evidence established by the Courts, and one which, even according to the terms of the rule, if I recollect aright Vice-Chancellor Mowat's judgment, bends to circumstances. In that case the discrepancies between the father and son were so great that he thought their evidence required confirmation and corroboration. In other cases—some that have come before myself—I have thought the corroboration might be of the slightest description, if it might not be dispensed with altogether, if the parties were credible, and if I believed them and placed confidence in their evidence.

In this case I think the evidence of the husband and wife is quite honest and fair, and I believe it to have been the case that prior to the execution of the first mortgage this promise was made to the wife: that from time to time it was renewed as other mortgages were made, and that it was carried into execution at the time of the sale.

It does not rest entirely, however, on the evidence of the husband and wife. It does not lack corroboration. I think in all the cases that have been referred to by Counsel for the Plaintiff, there has been nothing in writing shewing any promise in existence between the husband and the wife, but the deeds and the conveyances were attempted to be sustained by parol evidence of such a promise. Here, however, there is in the deed which was executed at the time of the sale, the recital of the agreement of the husband and wife as to the conveyance—an agreement that is evidence, and does not require corroboration. The deed is put in by the plaintiff's counsel, and the defendants did not require to give evidence in respect of the recitals in that deed, by which all parties were to be bound; and the language of that deed, although it is said to be confined entirely to the having an interest in the equity of redemption, I think is expansive enough to mean that the wife had at one time a right of dower in the property, and that the promise had been made, and that this deed was executed in pursuance of that promise. But at all events I do not think it necessary to go so far; all that is necessary, it seems to me, to shew is, that there is corroboration of some material point in the evidence of the parties. This is a material point: that there was an agreement to give her property in lieu of dower, and it is corroborated in the amplest manner by the production of the deed. It is a well-known rule that you do not require to corroborate parties under the statute in every particular. All that you have to do is, to shew that in some material point they are credible, and from that the Court may infer that they are telling the truth in other particulars. Here I give credit to these parties, as to their honesty of intention, to their veracity and their intention to tell the truth, and I find it corroborated in a most material point, in the deed that was executed when the property was conveyed to the wife.

I think the whole circumstances connected with the transaction also evidence the utmost good faith in these

parties. The property was sold, and it was sold, not for the purpose of squandering it, not for the purpose of making away with it, not for the purpose of cheating their creditors of the proceeds, but for the purpose of paying off these very creditors. Now if the parties had been very anxious to place the transaction in such a way that it could not be investigated, what was easier for the husband than to have taken \$400 or \$500 of the money produced by the sale and given it to his wife? In place of that, he gives her the piece of property which was intended by the original contract between them to be given to her.

The other circumstances of the parties are perhaps, when closely investigated, such as would hardly justify a voluntary settlement. I agree with the plaintiff's contention in that respect. It seems that the property was mortgaged, and the mortgages came so near the value of the property that it could hardly be considered, under *Masuret v. Mitchell*, 26 Gr. 435, as being very well secured, and there were other debts that were not secured at all, which were not provided for by the sale of the property. If it rested entirely upon that I think I would have had to make a decree for the plaintiff. But I base my decision upon the other ground—that there was an agreement between the husband and wife at the time when he was seized in fee of the property unincumbered, that if she would bar her dower to enable him to make mortgages on it, that he would give her this piece of property, and that he afterwards carried it out.

The plaintiff thereupon appealed, and the appeal came on for argument on the 18th January, 1882.*

Moss, Q. C., and *Beck*, for the appellant, contended that *Forrest v. Laycock*, 18 Gr. 611, upon which the Vice-Chancellor mainly relied in disposing of this case, was not a binding authority, looking to subsequent decisions as

**Present*.—SPRAGGE, C. J. O., HAGARTY, C. J., BURTON, and PATTERSON, JJ. A.

regards dower in an equity of redemption where the husband has not died seized. The defence set up by the answer was not sustained by any evidence other than that of the defendants themselves, which, uncorroborated, was not sufficient to warrant the making of the decree appealed from.

S. H. Blake, Q. C., for the respondents. The question involved in this appeal is solely one of fact, namely, did Maguire and his wife enter into the transaction with the intention and for the purpose of defrauding the husband's creditors? This the learned Vice-Chancellor has distinctly negatived, and, according to the principles enunciated in this Court, and acted upon almost daily, this finding of the learned Judge cannot be impeached. In fact the Vice-Chancellor has expressly determined that the several conveyances were executed not for the purpose of defeating or delaying creditors, but with the intention and object of discharging all Maguire's debts; and although one or two have not been satisfied, the evidence clearly established that every dollar realized on the transaction went for the benefit of creditors. This being so, it would certainly now be harsh and unreasonable, that the very inadequate consideration which the wife has obtained for the release of her dower in the large property her husband at one time held should be taken from her. That she did so bar her interest on the express promise of having this small portion of the estate conveyed to her, is distinctly proved by the evidence, and is expressly found by the learned Vice-Chancellor. In addition to the cases cited in the Court below, *Black v. Fountain*, 23 Gr. 174; *Fleury v. Pringle*, 26 Gr. 67; *Calvert v. Black*, 8 P. R. 255; *Morton v. Nihan*, 5 App. R. 20; *Freeman v. Pope*, L. R. 5 Chy. 533, were referred to.

September 23, 1882. PATTERSON, J. A.—The plaintiff, an execution creditor of John Maguire, attacks a conveyance of a parcel of land in Seymour, made by the debtor, in December, 1877, to a trustee for his wife, as having been

made with intent to hinder, delay, and defraud his creditors, and as therefore void under the statute of 13 Eliz. ch. 5.

The points to which the evidence on the part of the plaintiff was chiefly directed, and those most relied on in argument before us, were, that the conveyance was voluntary, and that its effect was to interfere with the remedies of creditors, inasmuch as, by means of it, a substantial part of the property of the debtor was withdrawn; and, after everything else was realized, some creditors, of whom the plaintiff was one, were left unpaid. From these premises, it is urged, the conclusion follows that the deed is within the statute.

The learned Vice-Chancellor, before whom the hearing took place, was convinced of the honesty of the parties in the transaction, and of the absence of any idea of hindering, delaying, or defrauding creditors. The evidence was very fully discussed at the argument before us, and I have since that re-perused it very carefully. I do not perceive any reason to doubt the correctness of the findings as matters of fact; and I believe I am right in my recollection that it was scarcely, if at all contended, on the argument of this appeal, that a different conclusion ought to have been deduced from the evidence, except as an inference from the premises to which I have just referred.

If those premises are established by the evidence, there is clear authority, which we should not feel ourselves at liberty to refuse to follow, for the conclusion for which the appellant contends.

To put the contention in the form of a direct syllogism, it takes this shape. Every voluntary conveyance by which creditors are hindered, delayed, or defrauded, is deemed to be made with intent to hinder, delay, and defraud creditors; the conveyance in question is a voluntary conveyance, by which creditors are hindered, delayed, and defrauded; therefore it must be deemed to have been made with that intent.

The rule of law which forms the *major premiss* is not disputed. It is established by many cases. It will be

sufficient to quote from one of those cited by counsel: *Freeman v. Pope*, L. R. 5 Chy. 538, where Lord Hatherley says: "But it is established by the authorities, that in the absence of any such direct proof of intention, if a person owing debts makes a settlement which subtracts from the property which is the proper fund for the payment of those debts, an amount without which the debts cannot be paid, then, since it is the necessary consequence of the settlement (supposing it effectual) that some creditors must remain unpaid, it would be the duty of the Judge to direct the jury that they must infer the intent of the settlor to have been to defeat or delay his creditors, and that the case is within the statute." It will be understood that it is a voluntary settlement that is here spoken of. See *Holmes v. Penney*, 3 K. & J. 99; *Kent v. Riley*, L. R. 14 Eq. 190; *Thomson v. Webster*, 4 Drew. 225; *Bayspool v. Collins*, L. R. 6 Chy. 228; *In re Johnson*, L. R. 20 Chy. D. 389.

But, while the *major premiss* is admitted, the *minor premiss* is disputed. It is denied that the conveyance in question was voluntary. We have to consider the merits of this dispute. I take the facts to be as found by the learned Vice-Chancellor, in accordance with the evidence of the defendants. His finding is undoubtedly supported by the evidence, and my own impression, as I gather the facts from the evidence, agrees with that finding.

The consideration relied upon in support of the deed is the wife's barring her dower in lands in Otonabee, which belonged to the husband. Three mortgages had been made of this land. I suppose, though I do not remember that it is so expressly stated by any witness, that the two first were redeemed, most likely by the money borrowed on the third one. The wife joined in each mortgage for the purpose of barring her dower, doing so upon each occasion on the promise of the husband to convey to her the Seymour property, after an incumbrance on it had been paid off.

In December, 1877, the husband sold his equity of redemption in the Otonabee land to one Jackson. The wife again claimed the Seymour land as the compensation

for barring her dower, and the deed now in question was then made, being executed, as it is said, on the same day as the deed in which she joined to Jackson, although the two instruments do not bear the same date.

If the bar of dower in the deed to Jackson were the only consideration for the deed to the wife, it might be proper to hold, in accordance with the cases of *Black v. Fountain*, 13 Gr. 174, and *Fleury v. Pringle*, 26 Gr. 67, that the deed was *nudum pactum*, inasmuch as the law being that the wife was not entitled to dower out of an equitable estate of which her husband did not die seized, the deed derived no additional value as a title deed from her being a party to it. See *Robertson v. Robertson*, 25 Gr. 486. It is not necessary to commit oneself to the opinion that, even in that case, the deed must necessarily be held to be a voluntary deed; or that considerations such as those ably discussed by Mowat, V. C., in *Forrest v. Laycock*, 18 Gr. 611, might not avail to uphold the settlement as valuable; because it is found as a fact that the agreement carried out by the conveyance dated from the making of the first mortgage, and that therefore the consideration was the barring of dower in the legal estate.

The question is not affected one way or the other by the recent statute 42 Vict. ch. 22, O: *Martindale v. Clarkson*, 6 App. 1.

Thus, the settlement not being voluntary, one of the premises of the syllogism fails, and the conclusion is unsupported.

The question of intent, under the statute of 13 Eliz. ch. 5 is the same whether the transaction impeached is voluntary or for value. The statute does not declare voluntary conveyances to be void. It only declares all fraudulent conveyances to be void. But whether a conveyance be fraudulent or not depends upon its being made "upon good consideration and *bond fide*:" *Kerr on Frauds*, 98.

When the deed is for value the presumption, from the fact that creditors are defeated, that the intent was to defeat them does not arise. The intent has to be deduced

from the whole evidence, as a fact, not necessarily without aid from the fact, if it so appears, that creditors have been delayed or defeated, but without the conclusive effect which the Courts have attached to that fact in the case of voluntary settlements.

What we are now asked to do is to disturb the decision of the Court below, upon the fact of the alleged intent. I think we should not be warranted in doing so, but that we should dismiss the appeal, with costs.

SPRAGGE, C. J. O., HAGARTY, C. J., and BURTON, J. A., concurred.

Appeal dismissed, with costs.

HARVEY V. GRAND TRUNK RAILWAY COMPANY AND GREAT
WESTERN RAILWAY COMPANY.

Parties—Joinder—Rule 94.

The plaintiff shipped goods from St. John's, Quebec, to Dundas, Ontario, to be carried from St. John's to Toronto by the Grand Trunk Railway Company, who delivered them to the Great Western Railway Company, who carried the same to Dundas, where the goods arrived in a damaged state. The plaintiff, being in doubt as to which Company was liable, there having been a separate contract with each, joined both as defendants.

Held, affirming the order of Proudfoot, J., who had affirmed the order of Mr. Dalton, Master in Chambers, 9 P. R. 80; that the case came within Rule 94, and that the plaintiff had a right to make both Companies parties.

This action was instituted in the Chancery Division by John Harvey against the Great Western Railway Company and Grand Trunk Railway Company of Canada. The statement of claim filed by the plaintiff set forth:—

" (1) That the defendant companies are common carriers of goods and chattels upon their respective lines of railways from St. John's to Toronto, and from Toronto to Dundas. (2) That about the month of September, 1880, the plaintiff purchased in the State of Connecticut certain machinery, goods and chattels, to wit, &c., and procured the same to be shipped upon and to be carried over the line of the Grand Trunk Railway Company from St. John's aforesaid to Toronto, to be there transferred for him to the Great Western Railway Company for carriage to Dundas aforesaid. (3) That the defendants, the Grand Trunk Railway Company, as common carriers as aforesaid, and not otherwise, received from the plaintiff's agents the machinery, " " at St. John's aforesaid, and for hire and reward in that behalf, undertook to carry the same safely, securely, and with due skill and care upon and over their said line of railway from St. John's aforesaid to Toronto, and there to deliver and transfer the same for the plaintiff to the defendants the Great Western Railway Company. (4) That defendants, the Great Western Railway Company, as common carriers, received the machinery, goods, and chattels, aforesaid from the defendants the Grand Trunk Railway Company for the plaintiff, and for hire and reward in that behalf, undertook to carry the same safely and securely from Toronto to Dundas. (5) That on the arrival of the machinery, " " at Dundas the plaintiff paid to the agent of the Great Western Railway Company the freight thereon, demanded and claimed by said agent for both companies. The plaintiff paid the said freight, protesting however that the defendant companies were indebted to him in a sum of money larger than the amount of said freight on account of the injury done to said machinery, &c., and the said agent received the same under protest, as aforesaid, leaving the

disputes and differences between the plaintiff and defendants in respect of the cause of action herein and the said freight to be arranged and settled between them thereafter. (6) That owing to the negligence of one or other of said defendant companies in the management of their respective lines of railway, the machinery, &c., while in their custody and under their control, were greatly damaged, broken, injured, and impaired in value. (7) That the plaintiff has made application to the defendant companies for payment of the amount of the loss and damage by him sustained in respect of the machinery, &c., but they have severally neglected to comply therewith, and make good such loss and damage, each company asserting that the damage happened and occurred while and during the time the said machinery, &c., were in the custody and under the control of the other of them. (8) That the defendant companies in their correspondence with the plaintiff in respect of the cause of action herein, have not denied, but have admitted that the breaking and injury aforesaid happened while and during the time when the said machinery, &c., were in the custody or under the control of one or other of the said companies, or partly when under the control of one company, and partly under the control of the other company and not prior to the delivery thereof at St. John's aforesaid. (9) That the Great Western Railway Company alleges that the said machinery, &c., were broken and damaged as aforesaid at Toronto, but before the same had been delivered over to them, while the Grand Trunk Railway alleges that the said machinery, &c., were broken and damaged at Toronto, but after delivery thereof to their co-defendant company. (10) That owing to the course pursued by the defendant companies, the plaintiff has been unable to ascertain the facts and circumstances relating to the breaking aforesaid, and is in doubt as to which of the defendant companies is liable to him in respect thereof and from which he should seek redress. (11) The plaintiff submits that in this action, the question as to which, if either, of the defendant companies are liable to him, and to what extent, should be determined as between all the parties to the action."

The defendants the Great Western Railway Company thereupon applied in Chambers for an order to strike out the Great Western Railway Company as defendants, which after hearing the solicitors for all parties the Master in Chambers (Dalton) refused to do, and dismissed the application with costs, observing in doing so:—

"In this case I act with some doubt. As far as I can see in treatises, and some hints in cases, the impression is rather against the view I take. There is no express case that I know of, but I think the spirit of the rule requires that the plaintiff should be allowed to join the defendant companies as he has done.

"There is a distinct subject matter, the damage to the goods, and the cause of action is one for which an action on the case could be sustained at Common law. Contract or no contract, the goods were delivered at St. John's for the plaintiff, and never seen by him till he received them damaged at Dundas. I think this is a case within the spirit of the Rule 94. It may be that there were two contracts, one to Toronto, the other from Toronto to Dundas; indeed I understand there were. The injury, however, has happened under circumstances which render it impossible for the plaintiff to say which company has injured him. And without an express case to the contrary I cannot think that it is material whether the carriage was under one entire contract, or under no contract, or as to the several parts of the journey, under separate contracts. The words of the rule are: 'Where in any action, whether founded upon contract or otherwise, the plaintiff is in doubt as to the person from whom he is entitled to redress, he may, in such manner as hereinafter mentioned, or as may be prescribed by any special order, join two or more defendants, to the intent that in such action the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties to the action.'

"The element which distinguishes this from the several kindred rules is, that the rule takes place where '*the plaintiff is in doubt from whom he is entitled to redress.*' I am quite sensible that judgment and caution are more necessary than zeal in discovering the limits of these rules, but I regard the *plaintiff's doubt* as a material and distinguishing element here introduced, and I suppose it to refer to a doubt which the circumstances render proper, if not necessary and unavoidable. Upon the best consideration I can give the matter, I think that from the spirit and nature of the rule itself, in a case like this, where the subject of the action is ascertained and identified, and the plaintiff's doubt as against whom his action will lie is unavoidable, he must be allowed the latitude of joining those whom the circumstances

point to as probably liable. Thus far, at any rate, I must be safe. The rule points to a case where the plaintiff's *doubt* may enable him to join a defendant whom he could not join under the other rules. Of course this must always be on peril of costs to the acquitted defendants. If the ground is that the plaintiff is in *doubt*, (and there is no other ground in the rule,) necessarily in *doubt*, is he less in *doubt* under such facts as appear here because there were two contracts for carriage? The cause of action may be looked upon as founded either in contract or in tort, and if the rule cannot be applied to such a case as this, I do not see where it could be applied, or why the distinguishing characteristic of "*doubt*" in the plaintiff was referred to at all. As I have said, there is no authority in point against this opinion, and although there are expressions in text writers and some in judgments, which suggest a contrary view, I feel bound to act on the opinion which I have formed upon consideration of the spirit and intent of this rule."

The defendants The Great Western Railway Company thereupon appealed to the sitting Judge in the Chancery Division, when the order was affirmed with costs.

The judgment is reported in 9 P. R. 80.

From this ruling of the learned Judge the same defendants appealed to this Court, and the appeal came on to be argued on the 24th of January, 1882.*

McMichael, Q. C., for the appellant.—Order 12, Rule 94 (MacLennan, p. 145,) of the Judicature Act was never intended to apply to a case in which the plaintiff was unable to prove a liability in any person for the wrong alleged to have been done to him, as in this case the statement of claim does not shew a *prima facie* liability in any one, but that order was intended to meet a case in which the person *prima facie* liable might be able to defeat the claim by throwing the responsibility on some other person.

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In this case the plaintiff says, one or other of two persons must have done the act. Suppose the party complaining commenced his action against all the inhabitants of a village, insisting that the act was committed by some one of them. If an action can be brought against two without charging that either of them is *prima facie* liable, it might be brought against a hundred. The case should be so presented that if no defence is made judgment should pass against some one: *Evans v. Buck*, 4 Ch. D. 482; *Honduras R. W. Co. v. Lefevre*, 2 Ex. D. 301; *Clark v. Lord Rivers*, L. R. 5 Eq. 91; *Cox v. Barker*, 3 Chy. D. 368; *Childs v. Stenning*, 5 Chy. D. 695; *Howell v. West*, Weekly Notes, 1879, p. 90; Griffith and Loveland's Practice, 226 & 228; Crump and Evans' Practice, 582.

J. K. Kerr, Q. C., for the Grand Trunk Railway Company, submitted that in the event of the order appealed from being reversed the names of his clients should be struck out of the action under the provisions of Marginal Rule 103. He also claimed that in such event they were entitled to their costs.

Muir for the respondent.—Both defendant companies are *prima facie* liable, and each company has an opportunity of defeating the claim against it by throwing the whole responsibility upon the other. There is an identity of subject matter, for it is alleged that the machinery was broken and injured while under the control of both companies acting together. There is also an identity of parties, for the companies were acting together as carriers; the one in delivering and the other in receiving, in pursuance of their respective agreements with the plaintiff in that behalf; therefore, as each company may be liable for distinct portions of the damage, it is necessary that both should be joined in order to determine the extent of the claim against each. He also referred to Rules 91 and 94.

June 30, 1882. SPRAGGE, C. J.—The judgment of Mr. Justice Proudfoot, states succinctly the case presented by the pleadings.

The 94th Rule of the Judicature Act, under which this proceeding is taken by the plaintiff, provides that "where in any action, whether founded upon contract or otherwise, the plaintiff is in doubt as to the person from whom he is entitled to redress, he may * * join two or more defendants, to the intent that in such action the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties to the action."

Some cases have been decided upon the corresponding rule in England, and upon the other rules of the Judicature Acts in relation to parties; and the rules have received a liberal interpretation. The late Chief Justice Sir Alexander Cockburn thus states the purpose of these rules: *Horwell v. London Omnibus Co.*, 2 Ex. D. 383 "The whole scope of this legislation is simply that if the plaintiff is uncertain as to which of two parties he shall proceed against, he is entitled to make them both defendants." And Lord Justice Mellish, in *Honduras R. W. Co. v. Lefevre*, at p. 306 of the same volume, says: "The rules ought to be interpreted fairly to carry out the intention of the Legislature in making them. There can be no question that the intention of the Legislature was, that it should not be necessary for the plaintiff to bring an action first against A. and then against B., and to run the risk of the jury taking a contrary view of the evidence in the two cases, but that he should have both defendants before the Court at once, and try it out between them."

None of the English cases shew, I think, so clearly as the case before us the propriety, and I may add the necessity to the ends of justice, of the rule under which this proceeding is taken, and to my mind none is more clear of real difficulty, in applying the rule to the case.

It is true that there were two contracts, one with the Grand Trunk Railway Company, the other with the Great Western Railway Company, the demurring defendants, but, as is said by the Master in Chambers, there is one distinct subject matter, the damage to the goods; and the cause of action is one.

The case of *Child v. Stenning*, 5 Ch. D. 695, presented quite as much difficulty, and difficulty of much the same character as is presented in this case. According to one state of circumstances, assuming that it existed, the plaintiff was entitled to damages against the defendants the Stennings, but if the Stennings had rights which they claimed to have derived from the same person as the plaintiff derived his title, (one Wagner) the plaintiff would be entitled to no damages against the Stennings, but he would be entitled to be indemnified by Wagner. So the plaintiff was, as in this case, entitled to relief against one or the other; against which would depend upon a fact as to which he was, through no fault of his, in ignorance. He would proceed for a tort against one party if the fact was one way, upon contract against the other if the fact was the other way. Vice-Chancellor Hall was of opinion that the case was not within the rule; but Lord J. James said, that but for the opinion of the Vice-Chancellor he should have thought that it was pre-eminently a case provided for by the rule in question, and Lords Justices Mellish and Baggallay, agreed with him.

The case of the *Honduras R. W. Co.*, to which I have already referred also presented its difficulties. The plaintiff was entitled to a remedy against one defendant, Lefevre, if the other defendant, Tucker, was his authorized agent in the matter of contracting for the purchase of shares in the plaintiff company. If Tucker was not the agent of Lefevre the remedy was against Tucker, and there was no remedy against Lefevre. Cockburn, C. J., and Mellish, Baggallay and Bramwell, L. JJ., held the case to be within the rule.

My brother Burton has summarized the case of *Howell v. West*, and I agree with his observations upon it.

I referred to the case of *Horwell v. The London Omnibus Co.* for the language of Cockburn, C. J., which I quoted. The case was under another rule; but there are a number of observations in various parts of the case pointing to the application of the rule in question, and all in favor of its

liberal interpretation. I have heard no sound reason suggested against the application of the rule to the case in question. The plaintiff is clearly within the *terms* of the rule. In truth all the rule calls for is, that the plaintiff be entitled to redress, and that he is in doubt as to the person *from whom* he is entitled to redress. There may be cases to which the rule ought not to be applied, but is the circumstance that for the carriage of these goods, which were damaged by the negligence of one of these defendants, he had a contract with each of them, a reason against the application of the rule?

I have asked myself the question how that circumstance can be a valid reason against its application, and no answer suggests itself to me. On the contrary, the case appears to me to be one peculiarly adapted for the application of the rule. One fact is certain (according to the pleadings) the goods were damaged *en route* by the negligence of one or other of these carriers. The plaintiff is embarrassed by the difficulty of not knowing by which. The case goes to trial, and the contest is between these two carriers, the Railway Companies, each trying to prove that it carried the goods safely, the great question being whether the goods reached the hands of the Great Western Railway Company from the hands of the Grand Trunk Railway Company in a sound or a damaged condition. That is certainly a question which ought to be tried between the two carriers. The plaintiff would have to shew that the goods were shipped in good order at St. John's, and received in bad order at Dundas, and there the proof by him should rest; and there it would rest under the old rules of pleading if there had been but one carrier from the one point to the other. There being two carriers, the difficulty and embarrassment and sometimes miscarriage of justice pointed out by Lord Justice Mellish would arise; and these were the evils which were intended to be remedied by the new rule—the plaintiff having both defendants before the Court at once to “try it out,” as he says, “between them.” As a matter of plain common sense, it is obvious that in a case like this,

the question by which of these two parties' negligence has the plaintiff suffered loss and damage ought to be fought out by these two parties themselves.

The case is within the terms of the order, and emphatically, I should say, within its spirit and intention, and it is not even suggested that any practical difficulty will arise in its application.

My conclusion is, that the order appealed from is right.

As to costs of the G. T. R. W. Co., they are entitled to their costs against the G. W. R. Co.

BURTON, J. A.—But for the case of *Howell v. West*, to which we were referred, and which does not appear to be anywhere fully reported, I should have doubted whether Rules 3 and 6 of Order 94, which is identical with Rules 3 and 6 of Order 16 of the English Act, applied to a case of this nature.

It seemed to me that the rules were intended to apply to cases similar to the *Honduras R. W. Co. v. Lefevre*, L. R. 2 Ex. D. 301, where the claim was against two persons arising out of a common transaction to which both of them were alleged to be parties—against the one as principal if the agent had authority to bind him, against the other who professed to be an agent if he acted without authority.

In that case, however, which is to be found in the Weekly Notes of 1879, at page 90, the action was brought by the plaintiff against the defendant West, who was the head master of a College, and the other defendant as a Surgeon.

The claim against West was, that when the plaintiff sent his son to him it was upon the distinct assurance and promise that he should be under his the defendant's wife's personal care, and not under the care of the Council of the College, and that the plaintiff should pay for such medical attendance as the son required: that he was received upon that assurance, and whilst there was taken ill, and was attended by Jones: that the illness proved to be scarlet fever, and he was, with the sanction of Jones, removed by

the other defendant to the infirmary of the College, which was not in a fit state to receive him, and in which he was not properly attended, and died.

As regards West, he was charged with breach of contract in removing him to the infirmary of the Council of the College contrary to his express agreement, and with negligence.

As regards Jones, that he was employed to attend his son, but neglected to exercise reasonable skill and care, and in the alternative charged that Jones as a surgeon warranted that he would use reasonable skill and care in his attendance on his patient, yet, that he did not possess or did not exercise reasonable skill and care, *per quod*, the plaintiff was put to expense and lost the services of his son.

The Queen's Bench Division held that there was a misjoinder, but this was reversed by the Court of Appeal, who held that they were rightly joined, but unfortunately the reasons for their decision are not given, but if that case is well decided, there should be no difficulty in extending the rule to a case like the present.

The plaintiff has sustained an injury to his goods whilst in transit, and if the allegations in his claim be correct, that injury must have been sustained on the railway of one or other of the defendants. He is entitled to redress from some one, and it is peculiarly a case in which a doubt is likely to exist as to the party to be sued.

I do not think it is possible for us to say that the construction put upon the statute is not the correct one, and we should dismiss the appeal, with costs.

PATTERSON and MORRISON, JJ.A., concurred.

Appeal dismissed, with costs.

BROWN V. SWEET.

Chattel mortgage—Notice—Religious society—R. S. O., ch. 95, sec. 13.

The trustees of a church had been sued by the defendant, and pending the action they passed a resolution authorizing the raising by loan of \$400 to pay off urgent claims, which recited that it was necessary to give security to the party making the advance. The plaintiff, being one of the trustees, thereupon advanced the money, obtaining from the trustees a chattel mortgage on all the movables contained in the church, which was prepared by a partner of the general solicitor of the trustees who was defending the action against them, but neither partner was called as a witness on the trial. In an interpleader issue the learned Judge found for the defendant.

Held, [BURTON, J., *dubitante*,] affirming the decision of the Common Pleas Division, that the mortgage was not invalid under R. S. O. ch. 95, sec. 13, and the fact that all the movable property of the mortgagors was included in the security, was not of itself sufficient to satisfy the Court of any fraudulent intent in making it.

Held, also, that the mere fact of the mortgage having been prepared by the partner of the solicitor for the trustees, was not sufficient to impute to the plaintiff knowledge of the pending action against the trustees.

Held, also, that the fact of the plaintiff being himself one of the trustees, to which position he had been appointed about three or four months before the advance had been made, was not sufficient to fix him with knowledge of the pendency of the action in face of his sworn statement that he was ignorant thereof.

Held, also, that the trustees had power to borrow the money and secure it by the chattel mortgage.

THIS was an appeal from the judgment of the Court of Common Pleas, making absolute a rule *nisi* to set aside the verdict obtained by the defendant and to enter a verdict for the plaintiff, in the Court below.

The proceeding was an interpleader issue, in which William Edwards Brown was plaintiff and Edmund Edmonds Sweet was defendant, and the plaintiff alleged that certain goods and chattels, to wit: one organ, pulpit, table, chairs, seats, benches, music stands, music and singing books, bibles and hymn books, book cases and Sabbath school library, stoves and pipes, furnaces and appurtenances, matting, clock, sofa, carpets, screens, stands, cooking utensils, crockery, coal, wood, &c., on the 12th of December, 1879, seized in execution by the sheriff of the county of Carleton, under a writ of *fiery fucias*, obtained by the said Edmund Edmonds Sweet, in an action against the trustees of the Eastern City of Ottawa congregation of the Methodist

Church of Canada, were, or some part thereof was, at the time of the said seizure, the property of the claimant William Edwards Brown, as against the said Edmund Edmonds Sweet.

This issue was tried at the Ottawa Spring Assizes, 1880, by Patterson, J. A., without a jury.

The plaintiff was examined on his own behalf, and swore:

"I advanced money to the trustees in November last. I advanced \$400 on chattel mortgage given by the trustees of the church to me. I advanced the money at the time. I paid \$25 in cash, and gave a check for \$375.

Cross-examined.—"I am one of the trustees, and have been since last July or August. Not before. I was then appointed. I think I have been a regular attendant at the meetings since I became a member. I was not aware that there was a claim against the trustees on this suit of Sweet's. I do not remember talking it over with any of the trustees. I do not remember that I heard it mentioned prior to the mortgage. I never examined to see if the trustees would cause a defence to the suit."

At the trial, evidence was also adduced to shew that, on the 29th of November, 1879, in consideration of the plaintiff having made an advance to the trustees of the above named congregation of \$400, for the purpose of paying off certain claims upon the church, they had authorized the execution in favour of the plaintiff of a mortgage on all the chattel property and effects belonging to the church, and the same was accordingly duly executed by the chairman and secretary of the board of trustees; and that the defendant, having recovered judgment against the trustees, sued out execution thereon, under which the sheriff seized the goods in question; and thereupon the interpleader proceedings were instituted.

At the conclusion of the case:

PATTERSON, J. A.—This is an interpleader suit, in which the question is the ownership of the chattels mentioned in the mortgage, all of which are chattels connected with or used in connection with the purposes of the congregation. the articles described are organ, pulpit, bibles, hymn books, Sunday-school library, kitchen utensils, in fact everything

one can imagine connected with the church as chattel property; though whether the pulpit would be chattel property I am not sure.

No evidence has been given as to the value of these goods; had there been it might have given assistance to one branch of the case. Apart from the value we have very sweeping provisions covering everything. These goods have been seized by the sheriff. The question has to be decided now whether the plaintiff's claim by virtue of the chattel mortgage can be maintained as against the execution. Is the instrument one which the trustees had the power to give? Is it a valid mortgage as given by the trustees in its present shape? Does it come within the provisions of the Statute of Elizabeth, as explained by our statute, as being made for the purpose of defeating or delaying creditors? The creditor mentioned as having been defeated by this deed is the execution creditor Sweet. As to the validity of the mortgage, and as to the powers of the trustees, I do not entertain any doubt. As against this objection I should hold the mortgage valid. The trustees are a corporation, and for the purpose for which the corporation exists there must be power to deal with property. I think they are created a corporation, though the terms are less definite than those ordinarily employed. I think their corporate existence is recognized by the defendant himself; he obtains judgment against them as a corporation and as owners of this property, and so causes the property to be seized under his execution. I think they would have the power to sell the property, and that the person who bought it and paid for it would have a good title to the property. I think it would be unreasonable to hold, that while they have the power to buy an organ, they could not exchange it for another, that they could not sell church furniture or make exchanges or deal with property they owned, in the same way as an individual might deal with his property. The law upon this subject will be found fully explained in the case of *The South of Ireland Colliery Co. v. Waddle*, L. R. 3 C. P. 493. The doctrine is there recognized

that the act of the corporation must be done by some individual as agent for the body. If they could part with it by sale they could conditionally, with the right to redeem in case they paid back the money which they borrowed. I think their power to give a mortgage cannot be disputed, in that respect. The question whether it is valid as against this execution creditor is a graver question.

The law is well settled that fraudulent intent can be charged against a corporation as well as against an individual, and a corporation may be guilty of many acts incurring criminal as well as civil liability, depending upon the intent with which they are done. I have no doubt an instrument made by a corporation may be avoided by reason of being given to defraud. In this case the knowledge by the Corporation of Sweet's claim is beyond all doubt. It was known that the verdict had been obtained, and whether one or two particular trustees did not know of it is immaterial, the knowledge of the corporation must be taken to be clear.

I find in this mortgage one element that is always regarded as one of extreme cogency in determining whether an instrument was really made *bond fide*, or whether it was made with the intent of preventing an expected claim from being realized against the property. I should gather that that element exists here as prominently and definitely as in almost any case. The whole property seems to have been conveyed without discrimination. In the case of individuals this element has been usually found to exist in the conveyance of furniture and effects or stock-in-trade, and, where it is so done as to cover anything, down to the kitchen spoons, it is taken as shewing the fraudulent intent. The security in this case included bibles, hymn books, wood and coal, which are there for use from day to day, and which cannot have been expected to remain without consumption until this money should fall due upon the mortgage. I do not know the value of these things. I do not know the value or the character of the Sunday-school library, or, indeed, whether it belonged to the trustees. I

am impressed with the idea that if the object was not to defeat this claim, articles of value only would have been given as security. The mortgagee could hardly have intended to depend upon the wood and coal as any part of his security. Taking these things into consideration, and taking the fact that Sweet's claim was pressing, and taking into consideration the provisions of our Act as explaining the Act of Elizabeth, which reduced the question to the narrowest limits, I shall be bound to hold that this mortgage, although given for actual consideration at the time, was so given for the purpose of defeating or delaying this particular creditor, and as against him the mortgage is void. I think the character of the transaction all through, and particularly the character of the mortgage, leads to that as the proper conclusion.

In Easter Term, May 19, 1880, *J. K. Kerr*, Q.C., obtained a rule *nisi* to set aside the verdict for the defendant, and to enter a verdict for the plaintiff.

During the same term, June 3, 1880, *Fitch*, (of Brantford,) shewed cause.

J. K. Kerr, Q.C., contra.

The arguments sufficiently appear from the arguments on appeal, post p. 732.

June 5, 1880. OSLER, J., delivered the judgment of the Court.

There is no doubt that the plaintiff actually advanced to the trustees of the church, for church purposes, the amount mentioned in the mortgage; that the mortgage was given for the purpose of securing the money so advanced; and that the money was advanced upon the faith of the mortgage.

The defendant, an execution creditor of the trustees, contends, however, that the mortgage is void, as having been made with intent to defeat or defraud creditors, under the Statute of Elizabeth, as explained by the Provincial Statute, R. S. O. ch. 95, sec. 13, subsec. 1. The mortgage

covers what is said to be the whole of the chattels belonging to the trustees, consisting of the church furniture and plant, so to speak, from the organ and pulpit to the hymn books and cups and saucers, knives and forks—the latter being presumably used at corporate festivities, such as tea-meetings, &c., &c.

The plaintiff is one of the trustees, but he was appointed only a few months before the defendant's judgment was recovered, and he swears that he was not aware of the suit and knew nothing of the defendant's proceedings. There is nothing on the minutes of trustees' meeting, or in the evidence at the trial, which, in the absence of any finding on this point by the learned Judge who tried the cause, would lead to the conclusion that the plaintiff's statement in this respect is not true.

The learned Judge entered a verdict for the defendant holding the mortgage to be fraudulent and void as against him, on the ground that it comprised the whole of the chattel property of the trustees, including articles of most trifling value, some of which, such as fuel, were in course of consumption, and could not, for that reason, form any substantial security. There is no other fact found or relied upon as being a badge of fraud.

There is evidence that the real property of the trustees is of large value and ample security above all incumbrances for the defendant's claim, and there was no evidence that the chattel property embraced in the mortgage was more than an adequate security for the amount advanced.

I feel great difficulty in holding that the transaction is a fraudulent one within the statute.

Apart from the facts that the advance was made and mortgage taken just about the time that the defendant was about to recover his judgment, and that the mortgage is assumed to include all the chattel property of the execution debtors, there do not appear to me to be any circumstances which, fairly viewed, throw suspicion upon the transaction, and against these facts may be set those which are strongly indicative of *bona fides*, viz.: the actual advance

of money at the time, and the existence of debts which, whether pressing or not, were due or accruing due, and had to be paid.

In order to attack the mortgage with success the defendant must establish in such a case as this that it was given not for the purpose of securing the creditor advancing the money, but really for the fraudulent purpose of defeating other creditors, and also that the creditor to whom the transfer is made is cognizant of such fraudulent purpose, and takes the security not with the *bond fide* intention of securing himself, but with that of aiding the fraudulent purpose of the debtor.

In the present case I am unable, after the most careful consideration of the evidence and giving full weight to every circumstance relied upon by Mr. Fitch as establishing the existence of fraud, to say that the transaction was not *bond fide* as to both parties to it.

In the absence of any evidence to shew that the property mortgaged was more than a fair security for the advance, I do not infer a fraudulent intention against either party merely from the fact that all the chattel property was transferred.

That fact alone, where there is a substantial present advance, has never, that I am aware of, been held enough to defeat a security.

In my opinion the mortgage in question was executed in good faith for the purpose of securing the money advanced upon it, and not with intent on the part of either mortgagee or mortgagor to defeat or delay creditors, and the rule should be made absolute to enter a verdict for the plaintiff. See *Dalglish v. McCarthy*, 19 Grant 578; *Knox v. Travers*, 20 Grant, 477; *Kerr v. Royal Canadian Bank*, 17 Grant 47.

Rule absolute.

The defendant thereupon appealed to this Court, and the appeal came on to be heard on the 2nd June, 1881.*

* *Present*.—SPRAGGE, C. J. O., BURTON and MORRISON, J.J.A., and BOYD, C.

Bethune, Q. C., and Fitch, for the appellant. At the trial the learned Judge who presided found as matters of fact that the chattel mortgage to the respondent was given with the intent to delay the appellant in the recovery of his claim, and that it was so given to the knowledge of the parties. These findings should have been adopted by the Court of Common Pleas as if the same had been found by a jury; and here the evidence fully sustains the finding of the learned Judge. Upon these findings and upon the evidence, the proper conclusion was, that the mortgage was and is void as against the execution creditor. Even if otherwise valid the mortgage is void as against the appellant, because it was executed and given without the observance of the formalities required in order to give validity to such an instrument on the part of a corporation, such as the judgment debtors in this case. The trustees of this corporation had no power or authority to give or execute the mortgage in the manner in which they assumed to give and execute the same; they had only power to hold property by virtue of their "model deed," and under the statute creating them. Besides, the requirements of the said deed and statute were not complied with in giving and executing such mortgage: *Meux v. Bell*, 1 Hare 73; *Bradley v. Riches*, L. R. 9 Chy. D. 189; *Rickards v. Gledstones*, 8 Jur. N. S. 455, 3 Giff. 298; *Espin v. Pemberton*, 3 De G. & J. 547; *Hargreaves v. Rothwell*, 1 Keen, 154; *Fuller v. Bennett*, 2 Hare 394; *Gerrard v. O'Rielly*, 3 Dr. & War. 414; *Hewitt v. Loosemore*, 9 Hare, 449; *Winter v. Lord Anson*, 1 S. & S. 434; *Ex parte Cohen*, L. R. 3 Chy. 20; *Ex parte Foxley*, L. R. 3 Chy. 515.

J. K. Kerr, Q. C., and W. H. Walker, for the respondents. To enable the defendant to attack the chattel mortgage successfully, it is necessary for him to establish that the mortgage was not given for the purpose of securing the repayment of the money advanced, but with the fraudulent purpose and intent of defeating and defrauding creditors; and that the mortgagee took the mortgage to assist the mortgagors in their fraudulent purposes, not to

secure himself for the actual advance made by him. This the appellant failed to establish. The learned Judge at the trial, though finding that the trustees had power to give the mortgage, and that it was in proper form, entered a verdict for the defendant, holding that although given for an actual consideration paid at the time it was fraudulent upon the ground that it comprised the whole of the chattel property of the trustees; that, however, if even it be the fact, is not sufficient to invalidate the security under the Statute of Elizabeth. The Court of Common Pleas was warranted by the evidence in concluding: (1). That the consideration money of the mortgage was actually advanced for church purposes to pay claims then due or to become due: (2). That the mortgage was given to secure such advance: (3). That the moneys were advanced on the faith of the mortgage: (4). That there is nothing in the evidence to shew that the chattels included in the mortgage were more than a fair security for the money advanced. However, if every vestige of personal property was included in the security that forms no ground for imputing fraud, as the mortgagors still held ample property to provide for the claim of the defendant. The evidence discloses that they held real property to the value of \$10,000 to \$11,000, (incumbered only to the extent of \$2,400), in addition to the chattel property mortgaged to the plaintiff to secure the \$400 advanced by him. Besides, it is clearly established by the evidence that the mortgage was executed in good faith, for the purpose of securing the money advanced upon it, and not with intent on the part of either mortgagors or mortgagee to defeat or delay creditors. The evidence completely fails to establish either that there was a fraudulent intent on the part of the mortgagors, or that the plaintiff had notice of such fraud, if any, or that the plaintiff had any notice of the defendant's judgment or suit, but on the contrary it was shewn that there was no fraudulent intent whatever on the part of either mortgagors or mortgagee, and that the plaintiff had no notice of the defendant's

judgment or suit : *Hale v. Saloon Omnibus Co.*, 4 Drew, 493 ; *Wood Dixie*, 7 Q. B. 892 ; *Alton v. Harrison*, L. R. 4 Ch. App. 622 ; *Darvill v. Terry*, 6 H. & N. 807 ; *Royal Can. Bank v. Kerr*, 17 Grant, 47 ; *Humphries v. Hunter*, 20 C. P. 456 ; *Trustees of the Ainleyville Congregation v. Grewer*, 23 C. P. 535 ; *Trustees of Berkeley St. Church v. Stevens*, 37 U. C. R. 9 ; *Re Pooley Hall Colliery Co.*, 21 L. Times, N. S. 690 ; *Jack v. Greig*, 27 Grant, 6 ; *Smith's Leading Cases*, vol. I, p. 26, (edition 1879.) *Addison on Contracts*, 6th edition, 151 ; *May on Fraudulent Conveyances*, 67 et seq. ; and 83 ; *Kerr on Frauds*, 154, 196, et seq.

September 23, 1882. SPRAGGE, C. J. O.—This is an interpleader issue, the plaintiff claiming the goods in question under a chattel mortgage dated 29th November, 1879, made to him by the trustees of a Methodist congregation of the Methodist Church of Canada, in pursuance of a resolution of the trustees authorizing the borrowing of \$400 “to enable the Quarterly Board to defray urgent claims,” and reciting that it was found necessary to give security to the lender, and therefore authorizing the Trustee Board to give its consent to the granting of a chattel mortgage on the movable effects of the Church, viz., on the organ, pulpit, seats, stands, tables, stoves and pipes, furnaces and appurtenances thereto belonging, matting, clock, Sunday-school library, and book-cases, cooking utensils and crockery ware. The mortgage given covered all these things ; in fact, as it would seem, every movable belonging to the Church.

The defendant was at the time plaintiff in a suit against the trustees of the Church, upon which he afterwards recovered a judgment for \$700. The date of the recovery of the judgment is not given, but I suppose it may be taken to have been on or about the 8th of December, 1879, as a writ of execution against goods was issued on that day.

The evidence establishes that the \$400 was actually advanced by the plaintiff, the mortgagee : that it was

borrowed for the purpose stated in the resolution, to enable the Board to defray urgent claims, among others, arrears of the minister's salary to the extent of \$231, and, as Mr. Pearson says, for the immediate expenses of the Church. He says also that the borrowing of money to the extent of \$400 or \$500 was at first agreed to by the Board if any one could be got to lend the money on personal security, but that it was found difficult to get any person to give personal security, and the money was then loaned as shewn in the mortgage.

The mortgagee had been a trustee since the preceding July or August. That, however, would not necessarily bring to his knowledge the fact that Sweet was prosecuting a claim against the trustees. What he says upon that point is, that he was asked to lend the money on the security of a chattel mortgage; and that at the time he lent the money he did not know that Sweet had sued the trustees; that he may have heard of it.

In order to bring the lender within the mischief of the Statute of Elizabeth, as interpreted by our Provincial statute, R. S. O. ch. 95, sec. 13, it is necessary for the party impeaching the mortgage to shew that it was "executed to the end, purpose, and intent to delay, hinder, and defraud creditors or a creditor." If the person lending money and taking security be innocent of any fraudulent intent, he cannot be affected by the fact, if it be a fact, that there was a fraudulent intent unknown to him in the mind of the borrower. The case would in that event come within the 6th section of the Statute of Elizabeth.

The learned Judge before whom the issue was tried does not say that he discredited the assertion of Brown that he did not know, when he lent the money, that Sweet was suing the trustees. He places his judgment upon other grounds, which I will notice presently. There were intelligible and very good reasons why the plaintiff, Brown, should make an advance of money. Mr. Pearson says he found that the Board was carrying a debt that was pressing on the minister for some years, and was

anxious that the trustees should be made aware of it: that he pointed out the injustice that it was to the minister, and pressed upon the Board the necessity of raising \$400 or \$500. It is a reasonable inference that when Brown was asked to advance the money, these reasons for its being required would be presented to him.

In *Bolt v. Smith*, 21 Beav. 511, the leading case upon this branch of the statute, no object could be assigned for the making of the impeached conveyance, except to defeat an execution issued against the grantor. Lord Romilly said: "Undoubtedly I see no motive or reason for this transaction except that if successful it would have prevented the plaintiff, the execution creditor, from taking possession of the house and property, and from selling them. * * I have no doubt that the moving consideration which induced the father to enter into this arrangement at this particular time was the fact that this execution was about to issue against him." The distinction between that case and the one before us is obvious.

In the judgment of the learned Judge who tried the issue, the question is treated as one between the execution creditor and the trustees. Almost every sentence of his judgment upon that branch of the case points to this, and in this I think, with all due deference, that he erred. A purchaser for value in good faith without notice is, I apprehend, within the protection of sec. 6 of the statute, and a mortgagee is a purchaser *pro tanto*.

The learned Judge attaches great weight to the circumstance of the mortgage covering all the chattels belonging to the church, even to very minute particulars. This was in substance directed by the resolution authorizing the loan; and the conveyancer would properly require an inventory in order to insert particulars, as required by the Chattel Mortgage Act. Then the creditor was not left without remedy, inasmuch as the value of the "church property," (the real property of the church, as I understand,) is proved to be, beyond incumbrances, more than ten times the amount of the debt due to Sweet.

I think the proper conclusion from the evidence so far is, that the money was actually advanced by Brown : that it was advanced in good faith for the purposes indicated in the resolution of the trustees, and not with the purpose of hindering any creditor : that Brown had no notice that his taking the chattel mortgage would have that effect, and had not present to his mind the existence of Sweet's claim against the church. I think further, that the desire of the trustees to borrow money upon personal security, to meet the pressing exigencies of the church, goes far to negative the intention imputed to them of giving this chattel mortgage for the purpose of withdrawing the property from the reach of creditors.

None of the cases cited to us shew that a chattel mortgage or sale made under the circumstances existing in this case is impeachable. There are cases which shew that it is not. One of these, and a very important one, is *Alton v. Harrison*, L. R. 4 Chy. 622. I extract the circumstances of the case from the head note. A trader debtor being in expectation that a writ of sequestration would issue against him for non-payment of money, executed a deed of mortgage which was registered as a bill of sale, vesting substantially all his property in trustees for the benefit of five of his creditors. The deed contained a proviso that the debtor should remain in possession of his property for six months, but not so as to let in any execution or sequestration, and in case any such should be enforced his possession was to cease. A writ of sequestration was subsequently issued. Lord Justice Giffard, in giving judgment said : " Only two arguments have been raised upon the deed : first, on account of the proviso that Harrison, the debtor, should retain possession of the property for six months, unless any sequestration or execution was issued against him ; and secondly, upon the fact that the deed comprised the whole of the debtor's property." After dealing with the first, and holding that it did not invalidate the deed, and observing upon the second, that it was not a proceeding in bankruptcy, but under the Statute of Elizabeth, he pro-

ceeds to deal with that which was the principal ground of decision in the case before us, thus: "I have no hesitation in saying that it makes no difference in regard to the Statute of Elizabeth, whether the deed deals with the whole or only a part of the grantor's property. If the deed is *bond fide*—that is, if it is not a mere cloak for retaining a benefit to the grantor—it is a good deed under the Statute of Elizabeth." This case was referred to with approbation by Thesiger, L. J., in *Ex parte James, In re Bamford*, 12 Chy. Div. 324.

The case differs from the one before us, in that the deed was for the benefit of persons already creditors, and gave them a preference over other creditors. Here Brown became a creditor, advancing his money and taking a mortgage, the advance and security being one transaction, but there is no law against such a transaction, unless it be done with a fraudulent intent. If it be *bona fide*, not a mere cloak for retaining a benefit to the grantor, it is not against the statute.

But it is said that Brown had notice, because his solicitor in drawing the chattel mortgage was solicitor for the trustees in defending the suit of Sweet against them. There is an admission in the cause, which is, that Messrs. Walker and McIntyre defended that suit. Brown in his evidence says: "Mr. Walker is our general solicitor," (meaning of the trustees,) "Mr. McIntyre acted for me in drawing up the mortgage." Neither of these gentlemen was called as a witness. What did Mr. McIntyre necessarily know? He was one of a legal firm that defended the trustees in Sweet's suit. He may or may not have had personal knowledge of that suit, but what he knew of it, if he knew anything, we have no information. It would appear from the case of *The Marseilles Extension R. W. Co., ex parte Credit Foncier and Mobilier of England*, 7 Chy. App. 161, that personal knowledge in the solicitor is necessary to affect the client with notice. What Mellish, L. J., said in that case at p. 169, is apposite to this. "Then, it is said that there was a common solicitor, and therefore every-

thing known to one company must have been known to the other. Mr Heritage is not called, and all that is said is, that he was the solicitor of both companies and used to attend their boards ; but what as matter of fact he actually knew, or what conclusion he drew from what he knew, we have no evidence. It appears to me it would be going very far indeed to say, not that the Credit Foncier had notice of any facts which had happened, but that they were bound by any knowledge that Mr Heritage might have of an intention on the part of the Marseilles Company to expend the money which they were professedly borrowing for a purpose quite legitimate, for some other purpose. * * No doubt it may have been part of the terms that there should be a mortgage, and Mr. Heritage may have been employed as their solicitor to draw up the mortgage deed. But I cannot think that is sufficient to affect the Credit Foncier with notice of any improper mode in which this money was to be expended, even if Mr. Heritage had, which I cannot see that there is any evidence that he had, notice that it was to be expended for an improper purpose."

A party is affected with notice of that which is known to his solicitor, on the principle that it is the duty of the solicitor to inform his client of the fact, and it will be assumed that he has discharged his duty ; but there can be no breach of duty in not informing the client, unless the solicitor himself had personal knowledge, and that is not shewn in this case. It might have been shewn if the fact were so, by calling the solicitor. No reason has been given for his not being called. Most of the cases in which the doctrine of knowledge in the solicitor being notice to the client has been applied, are cases in which it would be a direct fraud on the part of the client, with notice of the fact or facts known to his solicitor, to do that which he has done. They have mostly been cases of taking a conveyance with notice to the solicitor of there being a previous conveyance, and with intent by registration or otherwise to displace or postpone the title of the previous grantee. Counsel have not cited to us any case in which

the doctrine has been applied to a case at all resembling this in its circumstances. In the cases that I have seen on the subject, it has been the necessary effect of what has been done to displace or postpone the position of a prior purchaser or mortgagee. It is clear that it does not apply to all cases. Lord Chelmsford said, in *Eyre v. Bermester*, 10 H. L. Ca. 114, "All matters affecting the title to property, or the interests of other persons in connection with it; all circumstances which would entitle parties to equitable priorities, or change the character of rights which depend upon want of notice, if known to the solicitor, have the same effect as if actually known to the client. But I am not aware that this imputed knowledge has ever been extended to matters which have no reference to rights created or affected by the transaction, but which merely relate to the motive and objects of the parties, or to the consideration upon which the matter in hand is founded." I refer also upon this point, to the judgment of Lord Westbury, in *Wyllie v. Poller*, 32 L. J. Chy. 782. I may add my own conviction, that to carry this doctrine further than it has been already carried would lead to mischievous consequences.

I am unable to see the force of * objection to the trustees borrowing the money in question, and giving a chattel mortgage to secure repayment. The transaction had the sanction of the official bodies who are constituted the managers of the temporalities of the church. It is not denied that they are a corporate body, or that it is a power incident to a corporate body of this character to borrow money for corporate purposes, and to give security on corporate property for repayment. It is true that the model deed authorized by the Act of 1872, is of the real property of the Methodist body. But the fact of a mortgage of real property being thereby authorized, does not detract from the power which independently of statutory power is possessed by the corporation. The argument would rather be that if the realty of the corporation may be mortgaged *a fortiori*, may the personalty be mortgaged.

I do not think that there is any thing in the objection that it is not shewn that the trustees were, or made themselves, personally liable.

This objection, that the mortgage was *ultra vires*, was taken before the learned Judge at the trial of the issue, and overruled by him for reasons which appear to me to be sound ones. From the absence of any allusion to this point in the judgment in the Court of Common Pleas, I infer that it was not taken in that Court. Upon the whole I am of opinion that the judgment in the Common Pleas is right.

MORRISON, J. A., and BOYD, C., concurred.

BURTON, J. A.—There can be no question as to the law applicable to a case of this nature, and I strongly incline to the view that there has been a partial failure of justice in consequence of the omission of the shorthand writer to state fully the grounds of the learned Judge's decision. His note of the judgment is a very meagre one, and it must not be overlooked that a person in his position would not be aware of what was necessary to be established in order to invalidate such a transaction.

There were circumstances shewn at the trial strongly tending to shew that the grantors at least had the object in view of defeating the execution, and the fact that articles of the most trifling value, and other things, such as fuel and the Sunday-school library, to which probably the trustees had no title, were comprised in the mortgage, was not without weight in the actual circumstances of this case in leading the learned Judge to the conclusion that so far as they were concerned the mortgage was made with intent to prevent an expected execution from being satisfied from the property.

The money does not appear to have been required or applied to any pressing claim, nor in fact credited to the Quarterly Board for a month after its receipt.

Brown admitted on his examination that he may have

heard previous to the giving of his mortgage that the defendant had sued the trustees, and when this is coupled with the fact that he was one of the stewards of the church, and his duty was to look after the temporal management of the church, and that he was also a trustee, and present at the meeting when the matter was discussed, it was not a very forced conclusion for the learned Judge to arrive at, that he was cognizant of all the facts connected with Sweet's claim.

Whilst, therefore, I agree with the other members of the Court, in the conclusion that we ought not lightly to interfere with the decision arrived at by the Court of Common Pleas, I cannot avoid feeling that there has been a possible miscarriage from the causes I have referred to. I scarcely think that the learned Judge could have overlooked so important an ingredient in the inquiry, as that knowledge on the part of the transferee was necessary, although if that were established the mere circumstance that he actually advanced the money would not validate the transaction. No doubt in such circumstances it requires strong evidence to convince the tribunal trying the case, that it was made otherwise than in good faith and without any knowledge of the fraudulent intent, but the Judge at the trial had the parties before him, and might have formed a judgment as much from the manner of giving their evidence as from the expressions actually used.

It may be a misfortune for the defendant that the learned Judge's reasons were not more fully given, but I am not prepared to differ from the other members of the Court as regards this appeal, although if I had been a member of the Divisional Court I am not clear that I should have agreed in the judgment.

NELLES V. THE BANK OF MONTREAL.

Insolvent Act of 1875—Unjust preference.

K. had a line of discount with the defendants of \$20,000, for which \$5,000 collaterals were deposited as security. Sometime afterwards his indebtedness to the bank was nearly doubled when the agent insisted upon obtaining additional security by deposit of further collaterals, and which some months before the insolvency were deposited. This was impeached by the assignee in insolvency of K. as being an unjust preference of the bank.

Held, affirming the decision of the Court below, that the transfer to the defendants, of the securities as collaterals was valid, the plaintiff having failed to establish that K. contemplated insolvency :

Held, also, that the want of knowledge by the defendants' manager would not have availed the defendants, if the insolvent had, in fact, made the transfer in contemplation of insolvency.

Another transfer had been made to the bank within thirty days of the insolvency, which was also impeached, but upon the faith of which the bank had made advances to K. exceeding the value of the securities so transferred, which would not otherwise have been made.

Held, that the bank had not thereby obtained an unjust preference, and therefore the transaction could not be impeached.

The insolvent made a cash payment of \$1,000 to the bank a few days before his insolvency, but it was sworn that he had been allowed to overdraw upon an agreement to cover it by this payment, and it was not shewn that the bank manager had, at that time, probable cause to believe in his inability to meet his engagements in full :

Held, that this money could not be recovered back.

THIS was an appeal by the plaintiff from the decree of the Court of Chancery pronounced by Blake, V. C. (28 Gr. 449), where, and in the judgment, the facts giving rise to the suit sufficiently appear.

The appeal came on to be argued before this Court on the 16th of January, 1882.*

Rose, Q. C., and *J. H. McDonald*, for the appellant. The facts disclosed by the evidence, establish with sufficient certainty that Knowlton for some time before the suing out of the attachment, was in an undoubted state of insolvency ; and further, that Despard, the agent of the defendants, had an accurate knowledge of the affairs of Knowlton for a length of time prior to the issue of such writ, at all events, such knowledge as must have created in

* *Present*.—SPRAGGE, C. J. O., BURTON, PATTERSON, and MORRISON, JJ.A.

the mind of the bank agent a strong suspicion, if not a feeling of certainty that Knowlton was then actually and unmistakably insolvent; putting the case at the very lowest, the defendants had reasonable and probable cause to believe that Knowlton was unable to meet his engagements.

Street, for the respondents. The reasonable conclusion to be deduced from the evidence of the witnesses in this case, is that arrived at by the learned Judge in the Court below, namely: that Despard, the local agent of the bank, was not aware of the true position of Knowlton's affairs, before entering into the transactions impeached in these proceedings. The evidence clearly establishes that the dealings of the bank in connection with the drafts, and which have been impeached by the plaintiff in this proceeding were nothing more than discounts in the regular course of business, and not calculated in any degree to arouse any suspicion as to any want of *bona fides* on the part of Knowlton in his dealings with the bank.

September 23, 1882. BURTON, J. A.—The plaintiff is the assignee in insolvency of one Marvin Knowlton, and seeks in this action to impeach three transactions:—

1st. The transfer in part security to the bank of a certain acceptance given by Wm. F. Fawcett.

2nd. A transfer of certain acceptances of Thomas Fawcett.

3rd. A payment of \$1,000 received by the bank a few days before the insolvency.

The attachment against the insolvent issued on the 27th April, 1877.

The account was opened with the bank in 1875, and it was at first understood that the line of discount was not to exceed \$20,000, the bank at that time stipulating for obtaining collateral security to the extent of \$5,000 from one McClary. This line was, however, exceeded in the following year, upon an express agreement according to the bank manager's statement that the collateral should be proportionately increased. A statement which is in

substance confirmed by the insolvent and by Tracey his clerk, although in a subsequent part of the evidence attributed to Tracey, but which was manifestly a portion of that given by the insolvent, he somewhat qualifies it. I refer to that portion of it to be found on p. 27 line 1070 of the appeal book. The bank manager says :

"When Mr. Knowlton asked for increased accommodation I said that I would be willing to grant his request on condition that he would put up additional security, both in amount and character, to my satisfaction. Q. That would be about what time? A. That would be about the time he began to increase in September, 1876. Q. Did he accede to that? A. He promised he would do that, and on the faith of that promise I increased his line. Q. Did he shortly after that make any addition to the collaterals you held? A. He did; he gave me the paper of a customer of his—William Fawcett, of Strathroy—to the extent of \$4,100, I think. Q. Was it \$4,100 or \$4,000? A. About that, about \$4,000."

The insolvent does not deny this, nor does he state that there was an express agreement, as of course there could not have been when a line of \$20,000 only was contemplated, and collaterals applicable only to that line, but he admits that the bank manager told him that the line was larger than it should be for the amount of collaterals. He is asked:

"How did Mr. Despard get it? How did it come about that he got it? A. Well, in the first place, when I went in Mr. McClary put up \$5,000 of security for \$20,000 of a loan, and in the fall after I had placed this cash in there the discounts had run up to \$30,000, and Mr. Despard said that was larger than it should be for the amount of collaterals that was there and asked for this one afternoon; some conversation we had had in regard to this matter; and one afternoon he called at my office with Mr. Fawcett, and said Mr. Fawcett would like to buy some lumber, and then I made the sale to him of \$4,200, and subsequently I made larger sales."

As I have already stated, he qualified this, and I extract this portion of the evidence, which does not appear to be very accurately reported. In the answer to Mr. Moss's question, the words "had any authority" are perfectly unintelligible. This is, however, what is printed :

"Q. I want to ask you whether there was any agreement between you and Mr. Despard that you were to give securities if the line of discount was increased over \$20,000? A. No; there was only one agreement, and that was in writing when Mr. McClary was witness.

"Mr. Moss :—Do you mean to say that was not the case? A. When this was increased to \$30,000, in the fall of 1876 had any authority.

"Mr. Moss :—Mr. Tracey said there was an understanding to that effect; do you say otherwise? A. There was not to my knowledge; but what his arrangement was I do not know; I knew that whenever any difficulty came with the bank, this is the fact, that I always called in to settle the matter, so that it would seem a little strange that Mr. Tracey should make arrangements on his own account.

"Q. Was there difficulty? A. There was difficulty when the discounts ran up to \$30,000, and I put that up; and there was further trouble when it went to \$40,000, and I was asked for further securities, and put them up."

And here should follow the evidence I have alluded to, which reads thus :

"Q. And you did put up further securities? A. Yes, when I was asked. Q. So you did arrange then and agreed that you would put up further securities? A. Yes; and did put them up; the only arrangement was, that I would put up securities; he asked me for this \$4,000, and I put them up; there was nothing said about an arrangement to put up other securities. Q. Do you contradict Mr. Tracey?

"His Lordship :—Mr. Tracey said there was no agreement.

"Mr. Moss :—Mr. Tracey was managing these affairs for you? A. Mr. Tracey managed my banking affairs, but I never made any agreement only when I was asked; I do not know what Mr. Tracey might have arranged, but I never made any arrangement only when I was asked.

"Q. But if he made the arrangement I suppose you would not go back on it? A. Well, that would depend upon what the arrangement was. Q. Do you mean to say that an arrangement of that kind was one that you would not have allowed him to make?"

The evidence which Tracey did give was this :

"Q. Now, what way was Mr. Despard to get the notes? A. Because it was an arranged thing that if we took \$20,000 of a line we were to put up \$5,000, and as the line increased, Mr. Despard told us we must put it up or put our line down to the \$20,000 again, one of the two things, and the thing was clear enough. Q. Then this was in pursuance of an arrangement that had been entered into before? A. Well, it was an understanding; I always understood it to be so, that if we increased our line we were to put up corresponding security."

We have, then, evidence that on the opening of the account with a defined limit of \$20,000 there was a stipulation that \$5,000 of collaterals should be given, and that this was adhered to and insisted on when the surety desired to withdraw; an admission by the insolvent and his managing clerk that securities were demanded in conse-

quence of that line being exceeded, and that securities were given in consequence; and the bank manager's statement that the request to increase the line of discounts was granted solely upon the condition that additional securities should be deposited.

On the 30th November, 1876, the William Fawcett securities were received by the bank, and it is not without significance that these and the collaterals substituted for McClary's notes are comprised in the same hypothecation note.

The indebtedness at that time was somewhere about \$30,000 and increased a few days subsequently to over \$39,000.

The draft impeached, it is true, is dated 3rd March, 1877, but it was a renewal of one of the bills deposited as a collateral with the bank on the 30th November, 1876.

This transaction, therefore, occurred some months before the insolvency, and the *onus* is upon the plaintiff of establishing that it was made by the insolvent in contemplation of insolvency, as security for payment of a debt to the bank, whereby the bank obtained an unjust preference.

I will not say, if the evidence of McClary is to be implicitly relied on, that there was not some evidence to lead to the inference that the bank manager was warned by him as to the insolvent's condition; but, upon cross-examination, his statement did not very materially vary from the bank manager's, viz.: that McClary gave as a reason for withdrawing his security that the insolvent had not closed his account at the Bank of Commerce, and had exceeded his line of discount; but the bank manager denies that McClary had any conversation with him that would lead him to suppose that Knowlton was in an insolvent condition.

Under this section his want of knowledge would not protect him if the insolvent made the transfer in contemplation of insolvency, and the bank thereby obtained an unjust preference; but these two facts have to be made out before the plaintiff can recover.

The insolvent denies that he contemplated insolvency even at the time he went to New York. He had been promised assistance from wealthy relations there, and he says that but for his sickness he believes he would have obtained the relief required to enable him to carry on the business. It is quite possible that in that he may have been mistaken; but it was evidence upon which the Judge might properly find that he had not at the time he left, and *a fortiori* at the time of this transaction, any contemplation of insolvency: but even were it otherwise, one cannot say that the learned Judge's conclusion was wrong in a case like the present, where the deposit was made not for the mere security of the past indebtedness, but as a condition of future advances without which those advances would not have been made, and of which the insolvent's estate has presumably got the benefit.

The conclusion that I arrive at, therefore, in respect of the William Fawcett securities is that the transaction has not been successfully impeached.

The Thomas Fawcett notes stand upon a somewhat different footing. As to one of them, at all events, the transfer was made within thirty days of the issue of the attachment and presumed *prima facie* therefore to have been made in contemplation of insolvency; but this would be immaterial unless the bank obtained an unjust preference, and the evidence establishes that the bank made advances after their deposit largely in excess of the collaterals, and which it is sworn would not have been made if the demand for them had not been complied with.

As to the payment of the \$1,000, it seems to be clear from all the evidence that the account was overdrawn on the express understanding that this \$1,000 should be paid in.

It was necessary, in order to recover back this payment, for the plaintiff to establish that the bank manager knew of Knowlton's inability to meet his engagements in full, or that he had probable cause for believing such to be the fact.

Apart from the bank manager's express denial, it seems

to me so improbable that he would have allowed the account to be overdrawn with that knowledge, that I must confess I should feel a difficulty in understanding a contrary decision, and the payment of other cheques of the insolvent about the same time tends strongly to confirm the bank manager's evidence.

I am of opinion that we ought not to interfere with the judgment of the Vice-Chancellor, but should dismiss this appeal, with costs.

SPRAGGE, C. J. O., PATTERSON and MORRISON, JJ. A. concurred.

Appeal dismissed, with costs.

HUNTER V. VANSTONE.

Interpleader suit—Claimant not appearing—Judge's decision final.

The plaintiff, a Division Court bailiff, having seized a quantity of wheat under a warrant of execution against one P. which the defendant claimed, an interpleader summons issued, and on its return was adjourned with leave to the defendant to file his claim in fifteen days. Afterwards the case came up for final hearing, when the Judge made this order, "the claimant not having put in his claim or complied with the order above made is barred, and is ordered to pay the costs in fifteen days." The plaintiff, as such bailiff, thereupon brought this action to recover the wheat, which the defendant had obtained possession of pending the summons:

Held, on appeal [affirming the decision of the County Court Judge], that the minute so made by the Judge in the interpleader issue was equivalent to stating that the claim was dismissed, and was final and conclusive upon the defendant, and that he could not be heard to say that the bailiff had not seized the wheat.

The plaintiff was bailiff of the fifth Division Court of the county of Bruce, and having, as was alleged, seized under an execution issued out of that Court, in a cause of *George v. Pomeroy*, certain wheat which was claimed by the now defendant, an interpleader summons was issued pursuant to the Division Courts Act, on the trial of which, as it was said, his claim was disposed of adversely to him. Pending the summons, the defendant obtained possession of the wheat, and the bailiff, out of whose possession it had been taken, brought this action to recover it. On the trial the following consent was put in:

"We hereby consent to the jury being dispensed with, and this cause tried by the Judge, upon the production of the evidence of the proceedings taken in a suit or issue of the Fifth Division Court of the county of Bruce, wherein James George and John George are plaintiffs, and Richard Pomeroy is defendant, and the above-named defendant is claimant; and if the Judge be of opinion that the proceedings in the said Division Court suit estop the defendant from asserting in this Court any right to the possession of the goods and chattels in the declaration in this cause mentioned, he is to enter a verdict for the plaintiff of \$72.38; and if he is of a contrary opinion, a verdict for the defendant.

"WM. BARRETT, Plaintiff's Attorney.

"DAVID ROBERTSON, Counsel for Defendant.

"It is further agreed that no evidence given of claim of Vanstone to the goods in Division Court.

"Mr. Vanstone present at first day.

(Signed) "J. J. KINGSMILL, J."

The evidence admitted under this consent, and the further consent, which appears below, was as follows :

"George et al., Plaintiffs v. Richard Pomeroy, Defendant, Joseph Vanstone, Claimant.

"The following are the proceedings in this cause :

"On the 17th day of November, 1879, an execution was issued in the original suit, directed to George Deighton, bailiff, and was by him returned on the 28th day of November, 1879, *nulla bona*. On the 29th day of November, 1879, alias execution was issued directed to Matthew Hunter, bailiff.

"The execution was renewed on the 29th day of December, 1879.

"Interpleader summons was issued on the 17th day of January, 1880, and execution duly renewed up to last Court. On the 5th day of February, 1880, the case came up for hearing, and was adjourned as follows :

"'Adjourned and leave to claimant to file claim in fifteen days.'

"On the 1st day of April, 1880, the case came up for final hearing, when the following order was made :

"'The claimant not having put in his claim or complied with the order above made is barred, and is ordered to pay the costs incurred in fifteen days.'

"The claimant paid the costs of the interpleader, but not the bailiff's fees on the execution.

"Certified to be true extracts from the Procedure Book.

"Given under the seal of this Court this 13th day of May, A. D. 1880.

"CYRUS CARROLL, Clerk.

"We consent that the above writing be admitted as evidence of the interpleader proceedings in above suit of *Hunter v. Vanstone*, in the County Court of the County of Bruce.

"WM. BARRETT,

"D. ROBERTSON."

The Judge of the County Court [after stating the facts as above] remarked :

"As a matter of fact when the case was called on the 5th February, 1879, the claimant, now defendant, Vanstone, was before the Court and objected that there had not been a seizure ; thereupon I examined the bailiff, (now plaintiff Hunter,) and found there had been a seizure, and then ruled against this preliminary objection. The claimant not having complied with general rule 38 the case was adjourned to the next Court to allow the claimant to file particulars of his claim in fifteen days from the 5th February. After the matter was disposed of on the 1st April, 1879, the bailiff found that the defendant Vanstone had, previous to that day, while the case was pending, removed the wheat, and now proceeds in this suit to recover sufficient to pay the execution under which he originally seized. I am now called upon to say whether the interpleader proceedings estop the defendant from asserting in this suit any right to the wheat so removed by him.

"On the argument it was urged that there was no adjudication; that there being no evidence taken there could be no adjudication as required by sub-sec. 3 of sec. 210 of the Division Courts Act, which enacts that the county Judge shall adjudicate upon the claim, and I was referred to *Challoner v. Burgess*, 2 U. C. L. J. 137. The plea there was one in which no adjudication was alleged, but merely that the claimant made default and the Court held that the matter was not *res judicata*, and the plea no bar to the action; also to *Evans v. Sutton*, 8 Pr. R. 367.

"There is a distinction between the Division Courts Act and the Interpleader Act as applicable in other Courts. Rule 38 provides for the filing of claims and rule 39 provides for an adjournment so as to enable the Judge fully to adjudicate upon the claim upon the merits. Rule 40 provides that where the claim is dismissed the bailiff shall be allowed his costs out of the amount levied, and the form given (71) of adjudication on interpleader, shews that an adjudication on the merits is contemplated, but this cannot apply to a case where the claim set up was dismissed, which no doubt it well might be, for want of prosecution.

"R. S. O. sec. 10. ch. 54, provides that if a claimant abandons his claim he may be ordered to pay sheriff's costs. By sec. 25 of the same Act it is provided in case of carriers and bailees that where a claimant does not appear to maintain or relinquish his right or does not comply with an order made, the Judge may declare him barred from making or prosecuting his claim against such carrier or bailee.

"No such power of barring a claim is given by the Division Courts Act to the County Judge, and the form of order, judgment or adjudication used in this case certainly does appear not to have been exactly in accordance with the statute, rules, or forms given.

"Nevertheless I think that we may look at the power to make an order and the intention to be gathered from the words used, and see what the effect of such an order would be. Doubtless under the Act and Rule 40, the Judge had the power to dismiss the claim and then adjudicate upon it, for it must be remembered that he had before him the evidence of the bailiff, and order the claimant to pay the costs, and I do not think that in doing this he would be bound down to any particular form of words; and having the power to dismiss, I think the word "bar" is equivalent and could be used in place of "dismiss."

"See *Oliphant v. Leslie*, 24 U. C. R. 398, where it was held that although the minute was informal, yet it was in substance a dismissal of the plaintiff's claim. Draper, C. J., says: "I think we ought to look at the substance of the order as dismissing the plaintiff's claim." The form (31) of adjudication under the then existing rules was identical with the form 71 under the rules framed since *Oliphant v. Leslie*. Then supposing that the order was a dismissal of the claim made by Vanstone, we come to the main question, viz., whether these facts which as in *Oliphant v. Leslie*, should, I think, have been set out in the pleadings, estop the defendant from asserting any right to the wheat as against Hunter the bailiff.

"In considering this point we must bear in mind that these provisions

of the Division Courts' Act providing for an interpleader were enacted for the benefit and protection of the bailiff.

"Draper, C. J., says in *Oliphant v. Leslie*, p. 404: 'The interpleader summons was issued for the protection of the bailiff and the adjudication was against the plaintiff's claim, although in a form not regular, and unless we must hold that the proceeding was nugatory, by reason of the informal shape of the adjudication, the bailiff is entitled to the protection the statute intended to give him.'

"Much was said upon the argument upon the general question of estoppel which, in my opinion, is not strictly applicable to the case. The bailiff under the provisions of a statute made for his protection takes steps to ascertain whether or not he can sell certain goods seized by him; the party claiming them, by not filing his claim in accordance with the statute, refuses to try his right and, so far as the bailiff is concerned, his claim is dismissed. Can it be possible that, in spite of such proceedings, the bailiff is to be treated as not a party to them? If so the statute is no protection to the bailiff. Under the circumstances perhaps Vanstone is not estopped as against George the execution creditor, but I think he certainly is as against Hunter.

"Under Rule 37, the interpleader summons is issued by the officer charged with the execution, and the case shall proceed as if the claimant were the plaintiff and the execution creditor the defendant. I cannot see how we can treat the bailiff as not a party to it. In *Barrs v. Jackson*, 1 Y. & C. 585, V. C. Knight Bruce lays down the principles which govern such cases. 'It is', he says, 'I think to be recollected that the rule against re-agitating matters adjudicated is subject generally to this restriction that however essential the establishment of particular facts may to the soundness of a judicial decision, however it may proceed on them as established, and however binding and conclusive the decision may as to its immediate and direct object be, those facts are not at all necessarily established conclusively between the parties, and that either may again litigate them for any other purpose, as to which they may come in question, provided the immediate object of the decision be not attempted to be withdrawn from its operation so as to defeat its direct object.' Here, if Vanstone is entitled to question Hunter's possession of the goods, certainly the immediate object of the decision would be attempted to be withdrawn from its operation so as to defeat its direct object.

"The authorities in our own Court, in addition to *Oliphant v. Leslie*, above referred to, shew that the determining there is no claim is final and conclusive.

"In *Keane v. Steadman*, 10 C. P. 435, Draper, C. J., says: "The administratrix made a claim and had to support it, and if she failed to support it, what could be done but dismiss it? The want of evidence only shows that she could not or did not sustain her claim; and as the 191st section of the statute makes the decision of the Judge final and conclusive, we are not justified in reviewing it if he had jurisdiction to decide it, which is not denied. See also *Harmer v. Gouinlock*, 21 U. C. R. 260; *McCullum v. Kerr*, 8 U. C. L. J. 71."

Thus holding that the defendant was estopped from asserting in this action any right to the possession of the wheat in question, and against this decision the appeal was brought.

The appeal came on to be argued on 11th September, 1882.*

H. J. Scott, for the appellant.

McCarthy, Q. C., for respondent.

September 16th, 1882. The judgment of the Court was delivered by OSLER, J. [After stating the facts above set forth.] The defendant contends the order made by the learned Judge in the interpleader suit does not operate as an estoppel, there having been no adjudication by him, and no decision on the merits of the claim, as the order was made without hearing evidence, and in the absence of the defendant.

The Division Courts Act, sec. 210, (R. S. O. ch. 47) enacts that "in case a claim be made to or in respect of any goods * * taken in execution * * under the process of any Division Court * * by any person not being the party against whom such process issued then * * the clerk of the Court, upon application of the officer charged with the execution of such process, may * * issue a summons calling before the Court * * as well the party who issued such process as the party making such claim, and thereupon any action which has been brought * * in respect of such claim, shall be stayed." Sub-sec. 3. "The County Judge having jurisdiction in such Division Court, shall adjudicate upon the claim, and make such order in respect thereof, and of the costs of the proceedings, as to him seems fit, and such order shall be enforced in like manner as an order made in any suit brought in such Division Court, and shall be final and conclusive between the parties."

Mr. Scott argues that no adjudication on the claim has been proved by the evidence admitted under the consent;

* *Present*.—WILSON, C. J., GALT and OSLER, JJ, under order of 2nd September, 1882, ante p. 454.

that even if there had been one it would be no estoppel against the claimant in such an action as the present, but only in an action by or against the execution creditor. He also urged that the Judge has improperly founded his judgment to some extent upon his personal recollection of what took place at the return of the interpleader summons, instead of confining himself strictly to the admissions of the parties.

The latter objection appears to be well founded. The Judge evidently assumes it as "a matter of fact" that the defendant had objected, on the trial of the interpleader suit, that there had been no seizure by the plaintiff of the goods in question, and that, on such objection being made, evidence was taken and a seizure proved.

If we thought there was any force in this objection, or that there had been a possible miscarriage of justice by reason of the learned Judge having proceeded on facts not admitted, we should, instead of allowing the appeal, direct the evidence to be now taken and reported to us, as there is clearly power to do in a County Court appeal: 45 Vict. ch. 6, sec. 7, O.

We are, however, of opinion that all the facts necessary to support the finding are properly to be inferred from the facts admitted, on the principle *omnia præsumuntur rite esse acta*. It is admitted that the plaintiff had the execution as bailiff, and that the interpleader summons was issued on his application. That execution, interpleader suit, and the present action all relate to the same goods. It must be assumed that the interpleader summons had been regularly issued under circumstances which gave the Court jurisdiction. That necessarily implies that the bailiff had taken the goods in execution, for unless he had done so he had no right to interplead. The claimant was therefore regularly before the Court, and the consent shews that he appeared "at the first day," which we take to mean at the first Court at which the summons was returnable. The case was then adjourned, with leave to him to file his claim, which, as it appears, he did not do. Not having

done so, and having offered no evidence, he was "barred" and ordered to pay the costs.

I have no doubt the claimant might, on the return of the interpleader summons, have shewn that there had been no seizure of the goods, and therefore that the bailiff had no right to interplead. That was his time to take the objection, although he may of course shew, if he can, in a subsequent action between himself and the execution creditor, or bailiff, that the seizure complained of had no relation to the interpleader. Here neither course was taken by him, or, if he did object on the trial of the interpleader that there had been no seizure, it must now be assumed that the Judge found that fact against him.

The case, therefore, turns upon the form of the order made in the interpleader proceeding and its effect.

Mr. Scott cited *Challiner v. Burgess*, 27 L. T. O. S. 78, Q. B. April 26, 1856, cited 2 U. C. L. J. 137, to shew that, unless there is an adjudication upon the claim in that proceeding, the claimant may still prosecute his claim by action in the usual way. No doubt that is so; but as the learned Judge of the County Court points out, the case cited turns upon a point of pleading. The defendant alleged only that the interpleader summons had been obtained, and that the plaintiff did not prosecute his claim, but made default, whereupon the goods were sold, &c. The objection was, that the plea shewed no adjudication or order made by the Judge or Court upon the default, so that the case was still pending and a fresh interpleader summons might be issued. The case decides nothing as to the form of the adjudication, but only that the plea shewed none.

Here the Judge made an order declaring the now defendant to be "barred." That, it is said, is not an adjudication. The objection is really a matter of form, and section 155 of the Division Courts Act enacts that no judgment, order, verdict, or other proceeding shall be quashed or vacated for any matter of form.

The cases of *Oliphant v. Leslie*, 24 U. C. R. 398, and

Keane v. Stedman, 10 C. P. 435, referred to in the judgment appealed from, are, it appears to me, clearly in point. In the first case the claimant applied to the Judge to postpone the hearing of the interpleader issue, and the delay was granted on payment of costs. The plaintiff said he could not pay them, and the Judge then noted on the back of the summons: "Adjudged that the goods mentioned in the summons are the property of Charles Hull, execution creditor." This was clearly an error, as the goods should have been adjudged not to be the property of the claimant (the plaintiff), or to be the goods of the execution debtor. The Court said that no other intention than to decide against the claimant could be inferred from what appeared, and the substance of the order should be looked at as dismissing his claim. The bailiff had sold the goods under the execution after the disposal of the interpleader summons, and the claimant had then brought an action of trespass against him and the agent of the execution creditor. It was held that the jury should have been told that the proof of the minute of adjudication was the best evidence and conclusive in favour of the defence.

In *Keane v. Stedman*, 10 C. P. 435, the action was by the claimant against the execution creditor. Defence, adjudication upon an interpleader summons that the property was not the claimant's. The minute of adjudication proved was, "The property adjudged to be John Keane's (the execution debtor,) not claimant's."

It was objected that there had been no adjudication, because no evidence had been taken. Draper, C. J., said: "The proper parties were before the proper tribunal. The Judge in fact adjudicated against her (the plaintiff) and made a memorandum of his decision. The objection to this is again a matter of form, as to the want of evidence to support the decision. The administratrix (the claimant) made a claim and had to support it, and if she failed to adduce evidence to support it, what could be done but dismiss it? The want of evidence only shews that she could not or did not sustain her claim. And as the 191st section of the

statute makes the decision of the Judge final and conclusive we are not justified in reviewing it if he had jurisdiction to decide it, which is not denied."

From these cases then it appears (1) that it is the substance more than the form of the adjudication which is to be looked at. (2) That such adjudication may be made if the claimant be regularly before the Court, although he offers no evidence and makes default in appearing to support his claim: (3) That an adjudication so made is final and conclusive against the claimant in a subsequent action of trespass brought against the bailiff, or execution creditor, when the goods have been sold in execution after the adjudication.

What then is to be understood by an adjudication that the claimant is "barred?" We think, to use the language of the Court, in *Oliphant v. Leslie*, that no other intention than to decide against the claimant can be inferred from the use of that expression: that it is equivalent to an adjudication that he has not proved his title to the goods, and dismissing his claim. It follows that if the goods remained in the bailiff's possession, his duty would be to sell them under the execution and account for the proceeds to the execution creditor. By the hypothesis, however, the goods were lawfully in his possession. If the defendant has taken them he must have done so wrongfully, and is now as much estopped from denying the plaintiff's title to them in this action, brought to recover them back, as he would have been had the action been brought by him against the plaintiff for selling them after the adjudication. To hold otherwise would be to determine that the interpleader proceedings were nugatory, and to expose the bailiff to an action by the creditor for a false return.

We think, therefore, that the judgment appealed from is right, and that the appeal should be dismissed, with costs.

Appeal dismissed, with costs.

BAILLIE v. DICKSON.

Promissory note—Notice of dishonour—Renewal—Principal and agent.

Where the holder of a note employs a notary to protest the same at maturity, it is his duty to give the notary all the information that he is possessed of as to the names and residences of the indorsers. Therefore, where the signature of an indorser was so peculiar that no one unacquainted with it could decypher it, although the holder of the note was well acquainted with the signature, and aware of the party's residence, both of which he omitted to communicate to the notary, who when protesting the note made, as near as might be, a *fac simile* of the signature, and so addressed the notice of dishonour to "Belleville, P.O.," but the indorser swore that the notice never reached him, though resident in Belleville.

Held, [affirming the finding of Cameron, J.,] that the indorser was discharged.

The note upon which this action was brought had not been properly stamped, and it was urged that it could not be a payment or satisfaction of one of which it was intended to be a renewal.

Held, that the plaintiff being aware of the objection to the unstamped note, and receiving it in lieu of the paper which he held, could not urge this as an objection, he having declared upon it as a promissory note.

THIS was an appeal by the plaintiff from the judgment of Mr. Justice Cameron, given on the trial of this cause, whereby judgment was ordered to be entered for the defendant on all the issues upon the first, second, and third counts of the plaintiff's declaration herein, with costs of defence.

The facts of the case are clearly stated in the report thereof after a previous trial before Mr. Justice Galt, when a new trial was ordered without costs: 46 U. C. R. 167. The new trial accordingly took place at the autumn assizes of 1881, in Toronto, when after hearing the evidence and the arguments of counsel His Lordship took time to consider his judgment, and afterwards delivered the same as follows:

CAMERON, J.—The plaintiff, who resides in Montreal, sues the defendant, residing at Belleville, in the province of Ontario, on four several promissory notes made and payable as follows:

1. Note dated at Belleville, 8th April, 1878, for \$500, payable three months after date.
2. Note dated at Belleville, 6th July, 1878, for \$500 payable three months after date.

3. Note dated at Montreal, 1st February, 1879, for \$500, payable four months after date.

4. Note dated at Montreal, 1st February, 1879, for \$70.62, payable two months after date.

All the notes were made by one John H. Holden, payable to John Sutherland, and indorsed by him and the defendant.

The plaintiff's declaration contains counts on each of the above notes, and the defendant pleaded to the first, second, and third notes, payment by the maker, and also to the third and fourth notes, that he had not due notice of dishonor.

By the evidence it appears all the notes were given for the same indebtedness of the maker, John H. Holden, to the plaintiff, except the fourth, the small note for \$70.62, which was given to cover notarial charges and interest accrued on the first and second notes, and discount on the third. The interest was calculated at nine per cent. It also appeared that the maker, Holden, had, about the 9th June, 1879, paid \$200, and \$62 was paid by the insolvent estate of the indorser, Sutherland, in respect of the whole claim.

At the trial the contention of the defendant, as regards the first and second notes, was that they had been paid by the maker (Holden), by the acceptance by the plaintiff of the two last notes; and as to these notes, that no notice of dishonor had been given to the defendant which would relieve him not only from liability on these notes, but on the former as well.

The evidence shews that notice of the dishonour of the note for \$70.62 was duly given, and was received by the defendant. The plaintiff is entitled, therefore, to recover what is due in respect of that note; and I find, after deducting \$10, the proportion of the \$62 paid by the insolvent estate of Sutherland applicable to this note, there is due to the plaintiff on the said note for principal, interest, and notarial charges, \$74.10.

As to the third note, for \$500, dated the 1st February,

1879, the evidence to establish the protest and notice of dishonor on the part of the plaintiff is the protest itself, which, assuming it is admissible in evidence without a seal, which it has not, is contained in the notarial note or memorandum at the foot of the protest itself, and the evidence of the notary. The protest shews that the notice of dishonor was deposited in the post-office, in the city of Montreal, addressed George D. Dickson, Belleville. The notary, Mr. de M. Marler, in his evidence, said :

"I am a notary public in the province of Quebec. I protested the note for \$500, dated 1st February, 1879, now shewn to me. Q. I believe that one of the signatures was a little indistinct, and you had to make a *fac simile* of it? A. I could not make it out. Q. What name is on the notice you sent? A. The *fac simile* of the signature; the same as in the protest. I sent to Mr. Baillie's (plaintiff's) office, when I was sending the notice, to find out the name, Mr. Baillie or his clerk was not there, so I made an imitation."

The witness further swore that he mailed the letter so addressed himself, and that the address in the protest, which was filled in by his clerk, was Belleville, province of Quebec, and that he (witness) made the change when it came to him to be signed. It appeared also from the evidence that there is no place called Belleville in the province of Quebec, but that there is a place so named in New Brunswick.

Mr. Dickson, the defendant, swore that he never received notice of the protesting of this note.

Looking at the signature of the defendant on the note, if I did not know it as his signature, I would say the name was George W. Wilson, and not Dickson at all; and if I were a clerk in a post-office, to which such letter came, unless I was otherwise aware it was intended for the defendant, I should never think of delivering it to him. It is, in my judgment, the mark by which the defendant may be known and held responsible, as he has chosen to adopt it, when it is attached to a note or other document by him; but

written by some one else on the back of a letter put in the post-office would not be his address, and would not be addressed to George D. Dickson.

By sec. 16 ch. 42 Consol. Stat. U. C., it is declared that notice of protest shall be sent to each of the parties to a bill or note, "and such notice shall be deemed to have been duly served for all purposes upon the party to whom the same is addressed, by being deposited in the post-office nearest to the place of making presentment of such bill or note at any time during the day whereon such protest has been made, or the next juridical day then following." This Act, from the form of protest given in section 21, would seem to require the protest to be under seal.

By sect. 7, ch. 57, Consol. Stat. C., and sec. 35, ch. 62. R. S. O., it is declared, "Any note, memorandum, or certificate at any time made by one or more notaries public, either in Upper or in Lower Canada, in his own handwriting, or signed by him at the foot of or embodied in any protest, or in a regular register of official acts kept by him, shall be presumptive evidence in Upper Canada of the fact of any notice of non-acceptance or non-payment of any promissory note or bill of exchange having been sent or delivered at the time and in the manner stated in such note, certificate or memorandum." And by sec. 8, Con. Stat. C., ch. 57, and sec. 36, ch. 62, R. S. O., it is declared, "the production of any protest on any promissory note or bill of exchange, under the hand and seal of any one or more notaries public, either in Upper or in Lower Canada, in any Court in Upper Canada, shall be presumptive evidence of the making of such protest." The note made at the foot of the protest, assuming the instrument to be a valid protest without the notarial seal, is, as I have above set forth, that a due notice of the protest was served on John Sutherland and Geo. D. Dickson, "by depositing such notice directed to the said parties respectively at Belleville P.O. in Her Majesty's Post Office in this city of Montreal, on the 5th of June, 1879."

It is presumptive evidence that notice was sent to the

persons designated and no more, and if a person unacquainted with the signature of the defendant Dickson would not read the name written Dickson, the note is not presumptive evidence that a notice was mailed to Geo. D. Dickson the defendant; and when the person who actually addressed the notice swears he could not make out the name, and imitated the signature of the defendant, how is it possible for me to say he addressed the defendant?

If the sender did not know it was George D. Dickson, how can I find that he did address George D. Dickson, any more than he would have done so if George D. Dickson was unable to write, and made a tree to a note in the place of signature, and the notary drew an imitation of the tree on the back of the letter, and put Belleville P. O. under it.

I think I am constrained to find that the defendant had not due notice of the dishonour of the said note: that is, that notice of such dishonour was not put in the post-office in Montreal, addressed to him. If I am right in this conclusion, the defendant, by the omission of the plaintiff to give him notice of the dishonor of the note, was also relieved from liability on the notes in the first and second counts, whether the notes in the third and fourth counts were given in satisfaction and payment thereof, or were only taken on account, and in suspension of the right to sue on the former notes, till the maturing of the new notes.

The evidence is conflicting as to the real nature of the transaction; but looking at the letters that passed between the plaintiff and Sutherland of the 30th and 31st January, and the plaintiff's telegram of the 1st February, I am of opinion that as the note of the 1st of February was signed by all the parties, and not merely by Sutherland and Dickson, it was sent and taken in satisfaction of the other notes in accordance with the telegram of the 1st February.

I shall therefore find in favour of the defendant on all the issues upon the first, second and third counts, and for the plaintiff on the fourth count for \$74.68, without costs.

I shall also direct that judgment be entered for the defendant on the said first, second, and third counts, with full costs of defence; and that the defendant be allowed to set off his costs of defence against the said sum of \$74.63; and if such costs do not equal the claim of the plaintiff, the plaintiff shall have execution for the difference; and if the costs of the defendant exceed the claim of the plaintiff, the defendant shall have execution against the plaintiff to recover the difference.

The appeal came on for argument on the 14th of September, 1882.*

Bethune, Q. C., for the appellant, contended that notice of protest, addressed with a name which was a *fac simile* of the defendant's signature, to Belleville P. O., and deposited in the post-office, properly stamped and within proper time, was sufficient notice to the indorser. That the defendant could not be heard to complain that a notice, addressed to him in a *fac simile* of the signature by which he had indorsed the note, was not sufficient. Here the last note was not properly stamped, and the defendant could not set it up as a satisfaction of the earlier note. As a fact, the said later note, referred to in the judgment of Mr. Justice Cameron, was not accepted in satisfaction of the earlier note. He also relied on the opinions of the Chief Justice of the Queen's Bench and of Mr. Justice Armour, given in this case when before that Court, as reported 46 U. C. R. 167.

Geo. Kerr, for the respondent. The evidence shews that the defendant Dickson was merely a surety in respect of his indorsations of the notes in question, and that he received no value or consideration for such indorsations that the notes in the third and fourth counts mentioned were accepted by the plaintiff in satisfaction of the notes in the first and second counts, and subsequently the maker, Holden, paid \$200 thereon. The plaintiff failed to prove

**Present*.—SPRAGGE, C.J.O., HAGARTY, C.J., BURTON and PATTERSON, JJ. A.

that the defendant had notice of presentation and dishonour of the note in the third count mentioned. The certificate of the notary not being under seal, could not be received as evidence to prove notice of presentment and dishonour. He also contended that the plaintiff had given time to the principal debtor or debtors, and thus discharged the defendant.

Beckwith v. Smith, 22 Maine, 125 ; *Clarke v. Sharpe*, 3 M. & W. 166 ; *Burmester v. Barron*, 17 Q. B. 828 ; *Morton v. Westcott*, 8 Cushing, 425 ; *Montgomery Bank v. Marsh*, 3 Selden, 481 ; Con. Stats. U. C. ch. 42, sec. 16 ; Con. Stats. Can. ch. 57, sec. 6 ; Stats. Can. 37 Vict. ch. 47, sec. 1, were cited by counsel.

September 23, 1882, SPRAGGE, C. J. O.—It seems to be a proper conclusion from the evidence that the protest which the notary says that he posted did not reach the defendant. The evidence of the defendant's clerks, taken with his own denial upon oath, are sufficient upon this point, when we take into account the uncertainty of a letter addressd as this was reaching a person of the defendant's name.

It is conceded that if notice of the dishonour of the note was not given to the defendant, and if the plaintiff was not for any reason excused from giving notice, and the defendant was thereby discharged from liability upon the note 1st of February, 1879, the plaintiff cannot resort to previous notes, given in respect of the same debt.

The question that remains is, whether under the circumstances shewn to exist in this case, the plaintiff stands excused from giving effectual notice to the defendant. It is settled law that the holder of a note, notice of the dishonour of which must be given to a party in order to fix him with liability, must use due diligence to give such notice. The questions upon this point have arisen chiefly (as it was to be expected that they would arise) upon the sending of notices to the residence of the party entitled to notice. In *Beveridge v. Burgis*, 3 Camp. 262, Lord

Ellenborough gave his view as to the kind and degree of diligence that was necessary. The holder of a bill was ignorant of the place of residence of the indorser, and had made inquiries in regard to it only at a place where the bill was made payable. Upon this Lord Ellenborough observes: "Ignorance of the indorser's residence may excuse the want of due notice, but the party must shew that he has used reasonable diligence to find it out. * * Inquiries might have been made of the other persons whose names appeared upon the bill, and application might have been made to persons of the same name with the defendant whose addresses are set down in the directory." There are several other cases referred to in the text books upon the same point.

There are two cases in the American Courts, which come nearer in principle to the case before us than any others that I have met with. I refer to one of them, *Harris v. Robinson*, 4 Howard 336, for the reasoning of the dissenting Judge, Mr. Justice McLean, at p. 350; and to the other *Fittler v. Morris*, 6 Wharton 405, where the judgment of the Court was in accordance with the opinion of Judge McLean. In each of these cases the holder of a bill sought to excuse the not giving of notice of dishonour, by the ignorance of the notary protesting it of the place of residence of the party to be notified. Upon this Judge McLean reasons thus: "The notary did not act for himself, but as agent of the holder; and it was proved that Robinson, who appears to have been the holder, resided in the same town with the notary, and knew the proper direction for the notices. Now the holder is bound to give the notice himself, or through his agent; and can he evade the law by employing an agent who is ignorant of the residence of the indorser, which is known to himself? He knows where the indorser resides; is he not then bound to direct the notice as the law requires? It is a new principle in the law of agency, that the knowledge of the principal shall not affect him, provided he can employ an agent who has no knowledge on the subject. The holder is bound to communicate to the notary all the knowledge he has, so that the notice may

be properly directed. And if this be not done, and the notice is improperly directed, the holder loses his recourse against the indorser. This seems to me to be clear of all doubt."

In *Fittler v. Morris* the language of the Court was this (p. 414 :) "It is no excuse that the notary may have been ignorant of their place of residence. The payee and holder of the bill by his own evidence in the cause did know, and if he intended the notary to act as his agent, he was bound to tell him to what place to send his notice. Even some inquiry, and answer not satisfactory, will not justify a notary or party in directing to a wrong place." The court in which the former case was decided was of the higher authority in the States, being the Supreme Court of the United States, while the Court in which *Fittler v. Morris* was decided was the Supreme Court of Pennsylvania, but we are of course at liberty to accord our assent to that which is in our judgment the sounder in reasoning and in law; and I have no hesitation in adopting the reasoning of Judge McLean, in *Harris v. Robinson*, and the judgment of the Court, in *Fittler v. Morris*, and in holding that both apply in principle to the case before us.

Hewitt v. Thomson, 1 M. & R. 543, a *Nisi Prius* case, is distinguishable. It does not appear that the holder of the bill knew the real name of the drawer; and it is to be inferred from the way in which the case was put to the jury that they found that the mistake might more reasonably be said to result from the defendant's own manner of writing his name in the bill, than from the want of proper care on the part of the plaintiff or his attorneys. The drawer's name was Thomson, not Thompson with the p, the more usual way of spelling the name. The attorney took it to be Thornton. The first three and the last two letters in the two names are the same, and the finding of the jury shews that the *m* might well be mistaken for *rn*, and the *s* for *t*; in other words, that the name as written was misleading, and that the mistake was not, in the words of the charge to the jury, attributable to the want of proper care on the part of the plaintiff or his attorneys.

There is a later case, *Berridge v. Fitzgerald*, L. R. 4 Q. B. 639, which is apposite to this case, so far as the language of Cockburn, C. J., and Blackburn, J., is concerned, upon the question of the diligence incumbent upon the holder of a note to find out the residence of a party entitled to notice of dishonour. So far as it goes it is in favour of the defendant.

I find that I have omitted to notice Mr. Bethune's argument, that the note in question not being stamped could not be a payment or satisfaction of the note for which it was intended to be substituted. The answer to this argument appears to be this: the plaintiff knew exactly the nature, and the value also, of the paper in question, and with that knowledge agreed to accept it in substitution for the paper that he then held. Further, the paper that he agreed so to accept was not worthless; the most that can be said is, that it might through his neglect become worthless, for if it can be said that the expenditure of so trifling a sum as sixty cents would give it its full face value, it was sheer folly and neglect not to add stamps to it. I think, too, that it may fairly be said that accepting the paper in its then state, there may be taken to have been a tacit understanding between the plaintiff and the party through whom the paper reached him, that he would himself put stamps on the note, as a mere matter of business; that party (probably Sutherland) might well assume that he would not omit that which according to his own shewing was so essential to his own interest. Another answer to this position is, that it is entirely at variance with the plaintiff's own pleading. He declares upon this paper in his fourth count as a valid subsisting note upon which he is entitled to look to the defendant for payment. This is wholly inconsistent with his present position.

Upon the whole, my opinion is, that the judgment of the learned Judge appealed from should be allowed to stand, and that the appeal should be dismissed, with costs.

HAGARTY, C.J., BURTON and PATTERSON. JJ. A., concurred.

Appeal dismissed, with costs.

MILLS ET AL. V. KERR ET AL.

Assignment for benefit of partnership creditors—Separate creditors—Parol evidence—Void deed.

Two persons carried on business under the name of "G. & W." Having become unable to pay their liabilities, they made an assignment to the plaintiffs of all their partnership effects and of all the personal effects of G., "other than wearing apparel," in and about the dwelling-house of G., in trust to pay all the creditors of "G. & W."

Held, [affirming the judgment of the Court below, 32 C. P. 68,] that the deed was void, in consequence of providing for the payment of partnership creditors only; and parol evidence was not admissible to prove that the object of the parties, in making the assignment, was to provide for the payment of separate as well as partnership creditors.

THIS was an appeal by William H. Mills and Frederick B. Skinner, plaintiffs in an interpleader issue, from a judgment of the Court of Common Pleas, (32 C. P. 68), the question involved in the proceeding being "whether, at the time of the seizure of the goods and chattels in question, the same were the property of the appellants as against the respondents," Augustus T. Kerr and John Alexander Mackellar, the defendants in the proceeding.

The issue having been settled by the solicitors for the respective parties came on for trial at Guelph before Cameron, J., without a jury, at the Spring Assizes of 1881, who entered a verdict for the plaintiffs, which, upon motion in Easter Term following, was set aside and a verdict ordered to be entered for the defendants, whereupon the present appeal was instituted.

The facts appearing in the case were that Jacob L. Goold and William Wilson had for some time been carrying on business together in copartnership as carriage and waggon makers in the city of Guelph under the name and firm of "Goold & Wilson;" and that having become involved and unable to pay their debts, they did, on the 4th December, 1880, execute an indenture, expressed to be made between Goold and Wilson of the first part, the wife of Goold of the second part, and Mills and Skinner of the

third part, whereby Goold and Wilson conveyed to Mills and Skinner all and singular their

"Lands and tenements, * * stock in trade, goods and chattels * * now upon the said premises * * and also all the household furniture, goods, chattels and effects whatsoever of the said Jacob L. Goold (the personal wearing apparel of himself and family excepted) now being in and about the dwelling-house and premises of the said Jacob L. Goold on, &c. * * together with all deeds, books, writings, bills, notes, receipts, papers and vouchers touching the same or any part thereof * * And the said parties of the third part shall stand possessed of all the property hereinbefore mentioned, and all moneys arising thereout and out of the proceeds thereof, and the amounts which from the sale, disposal or collections accrue or are collected or realized, to pay, distribute and divide such proceeds and amounts to and amongst all the creditors of the parties of the first part, for the purpose of paying and satisfying them ratably and proportionably, and without preference or priority, according to their just debts, deducting so far as legally can be done all costs of and about these presents and all lawful costs and expenses that may necessarily be incurred in realizing the same or carrying into execution these presents or the trusts thereof, so far as may be lawfully and properly done."

In this conveyance the wife of Goold joined to bar dower, and the deed was duly registered in the office of the clerk of the County Court on the 7th of December, 1880.

It appeared on the trial that Kerr and Mackellar had recovered a judgment against Jacob L. Goold, on the 30th December, 1880, on which they sued out execution, and that the judgment was so recovered in a suit originally commenced on the 21st December, 1880, by summons issued against Jacob L. Goold, William Wilson, and Caroline E. Goold, wife of Jacob L. Goold, on a promissory note made by Goold in his individual name, and in the name of his firm, "Goold & Wilson," and by the said C. E. Goold. It appeared in evidence that Goold, after the service of the writ of summons, went to the attorney for Kerr and Mackellar, and explained to him that the goods assigned to the appellants were the property of his (Goold's) wife, as she had given him the money to buy the furniture, but he had applied it otherwise, and he wished her interest to be protected. The attorney advised him to go and consult a lawyer, and he did so, and gave him instructions to do

what was necessary to enable Kerr & Mackellar to obtain judgment against him as soon as possible, with a view to the seizure of the goods in question, which had been advertised by the appellants for sale, by auction, on the 31st December. His attorney, in accordance with these instructions, appeared to the writ, received declaration, pleaded to the common counts, allowed judgment to be signed for want of a plea to the count on the promissory note, and the attorney for the defendants in that action thereupon dropped the other defendants, Wilson and Caroline E. Goold, and took judgment against Goold alone, and then caused the sheriff to seize the goods shortly before the hour appointed for their sale.

The plaintiffs in the interpleader proceedings, the now appellants, gave notice of their claim, and the sheriff applied for the order to interplead.

There was no dispute as to the *bona fides* of the assignment, but the defendants in the issue contended, that as under the trusts of the deed only the creditors of the firm of Goold & Wilson could share in the benefits of the trust the deed must be considered as fraudulent and void against a creditor of Goold alone, which they were, although they were creditors of the firm also. The other facts are clearly stated in 32 C. P. 68.

The appeal came on to be heard on the 20th of January, 1882.*

S. H. Blake, Q. C., for the appellants. By the indenture of the 4th December, 1880, all the estate separate and partnership of Goold & Wilson was transferred to the appellants, Mills & Skinner, to pay all the creditors of Goold & Wilson, ratably and proportionably, and without preference or priority; consequently it could not be deemed nor would it be fraudulent or void; and under it the assignees are bound to realize the estate transferred, and to dispose of the same ratably amongst the creditors, joint and separate, according

* *Present*.—SPRAGGE, C. J. O., HAGARTY, C. J., BURTON and PATTERSON, JJ. A.

to their respective rights. On the face of the deed there is not apparent any intent to defeat, delay, or prefer any creditor, and in the evidence given any such intent is completely disproved; and it is shewn that the deed was executed under the statute "for the purpose of paying and satisfying, ratably and proportionably, and without preference or priority, all the creditors" of the assignors. It cannot, therefore, be invalidated under the Act. The goods in question actually passed by delivery to the assignees to satisfy ratably the claims against Goold & Wilson, including that of the defendants, and cannot now be taken from them to satisfy, in preference, the claim of the respondents. Besides, at the date of the deed of assignment the respondents' claim against Goold & Wilson was a joint and separate one, and it was not until after the execution of that deed that they elected not to proceed against the partners on the note. There cannot, under any circumstances, therefore, have been an intent to defeat or delay these parties, or give a fraudulent preference against them. The judgment of the respondents is in itself, and the mode of its recovery, a fraudulent preference in their favour, and therefore the Court will not aid them in the present action.

Rose, Q. C., for the respondents. What is insisted upon by the respondents is, that they are execution creditors of J. L. Goold, and as such are entitled to have their judgment satisfied out of his separate estate without reference to the deed of the 4th December, 1880. The evidence shews that they refused to credit the firm of Goold & Wilson, and advanced the moneys on the note, on which they recovered judgment on the separate credit of J. L. Goold and his wife C. E. Goold. The deed of assignment must be deemed to be fraudulent, on the ground that it assumes to deal with the separate property of J. L. Goold, as well as the partnership property of Goold & Wilson, and does not provide for a ratable distribution of the separate estate of either of the parties amongst their respective separate creditors, but on the contrary directs a distribution of Goold's personal estate amongst the credit-

ors of the firm only ; the trust being to pay such proceeds to and amongst all the creditors of the parties of the first part, who are described as carriage builders, trading under the firm name of "Goold & Wilson." The assignees are bound by the terms of the deed under which they claim, and from which they derive their authority, and cannot add to, subtract from, or vary the terms of it ; and the legal effect and intent of that instrument is to be gathered from its language, and not from any extrinsic evidence in regard to the intention or acts of the assignor or of the trustees claiming under its provisions. The legal effect of this deed is to create an unjust preference in favour of the partnership creditors of "Goold & Wilson," and therefore the intention of the assignors or the subsequent conduct of the trustees in carrying out its provisions cannot render valid what is in law void ; and the respondents never having acquiesced in the deed or adopted its provisions in any way are not estopped from now disputing its validity. It is an error to say that the result of a decision in favour of the respondents would be to work a fraudulent preference, as the action of the respondents does not create any unjust priority or preference in their favour, and will not prevent an equitable distribution of the partnership assets amongst the partnership creditors.

The trustees, the appellants representing only the partnership creditors, and entitled to deal only with the partnership property, cannot dispute the validity of the judgment obtained by the respondents ; and under any circumstances the appellants cannot question the validity of their judgment, as in this form of action the question is not whether the execution creditors had a right to seize the goods, but whether the appellants had such an interest in them as entitled them to resist such seizure.

September 23, 1882. PATTERSON, J. A.—I have not been convinced by the arguments addressed to us, or by the examination of the authorities cited, that the judgment appealed against is erroneous. On the contrary, I think.

that while the grounds on which that decision is placed are conclusive against the validity of the assignment as against the execution creditor, they do not exhaust the objections to it.

There does not seem to be room to contend, and indeed it has not been contended, that the deed does not operate to convey to the assignee all the property of each of the partners, several as well as joint.

It is, I think, equally clear that the trust is for the joint creditors only. If the words "amongst all the creditors of the parties of the first part for the purpose of paying and satisfying them ratably and proportionably, and without preference or priority, according to their just debts," could be read as including separate creditors as well as joint creditors, the matter would not thereby be mended, because the separate debts of the one might, so far as the provisions of the deed are to govern, be paid out of the separate property of the other. There are no facts shewn such as in *McDonald v. McCullum*, 11 Gr. 469, saved the assignment.

Mr. Blake argued that the words which I have just quoted were qualified by those which follow them, viz., "so far as may be lawfully and properly done," and that under the whole clause, thus read together, the duty of the assignee was to distribute the estate according to the rights of the respective creditors. I do not see my way to give the phrase thus relied upon the effect contended for. I take its office to be to restrict the preceding direction to pay ratably and proportionably and without preference or priority, by empowering and requiring the assignee to regard priorities or preferential rights which might happen already to exist, but not to extend the class of creditors who were to share in the distribution.

If we could read the words: "So far as may be lawfully and properly done," as conveying a direction to distribute among all the creditors of the assignors, or of either of them, according to their respective legal rights, we should impose upon the assignee a duty which might be found

embarrassing. Not having a bankrupt law or other express definition of the rights of different classes of creditors to guide him, the direction would not be one on which he could proceed with certainty of being right.

It may be, as remarked by Mr. Rose during the argument, that the statute makes it difficult to frame an assignment by partners who have several as well as joint creditors; but that is a question with which we are not, at present, called upon to deal.

Mr. Justice Cameron, at the trial, based his judgment upon a ground which, having regard to the numerous cases decided in our Courts respecting documents like that before us, seems to me to be the only ground capable of being urged with much force: "If the intention of the assignor," he is reported to have said, "is to be determined by the effect of the assignment, without reference to its object and actual intent, then, assuming the contention of the defendants to be well founded, that the trusts of the deed only extended to creditors of the firm of Goold & Wilson, and not to the creditors of the individual members of the firm, and taking that to be its true effect, the deed would be void. But I am of opinion that is not the construction that must be put upon the statute. To invalidate such a deed, the assignor must have it in his mind that his act would defeat or delay his individual creditors, or would give to the creditors of the firm a preference over the individual creditors, and must make the assignment with that intent. And I find, as a matter of fact, that the assignor in this case did not contemplate or intend to give any of his creditors a preference over others; and his object was, to have his estate and effects applied and distributed ratably among his creditors, without preference or priority. If his act has the effect of giving such preference or priority, it is the result of the construction put by the law upon the language used, and not of the assignor's intent."

I do not repeat the answer given to this in the Court below. I think that answer disposes of the question in accordance with the law as long ago settled with refer-

ence to conveyances impeached under the statute in question. But I have quoted the learned Judge's language at length, because it seems to me to involve a fallacy which suggests another answer.

By the deed, the grantors have said something which has in law a certain meaning and effect. That is what the learned Judge calls "the construction put by the law upon the language used." Phrase it as we please, it comes to this, that the parties have made a deed the legal effect of which is to make a certain disposition of their property. If their intention was, that the deed should have that effect, the intention was illegal, and that disposition cannot stand. But they say they did not intend it. What then? Are the separate creditors to be cut out by a deed which their debtor did not intend to make? The intention being to provide for all creditors equally, that intention has not been carried out, but a deed of a different effect has been inadvertently executed. Such a deed should be either reformed or set aside. It cannot stand in the way of an execution creditor.

The intent, which, under this statute, and under the statute of 13 Eliz. c. 5, has to be dealt with as a question of fact, has never turned, so far as I am aware, upon the debtor's misunderstanding of the effect of his own deed.

The fallacy consists, as it strikes me, in treating the issue as confined to the effect of the statute. The issue is, whether the goods were the property of the assignees as against the execution creditors. The position which the assignee has to take, in order to re-establish the finding in his favour, is, that he holds under a deed which only avoids the mischief of the statute because it is not the deed his assignors meant to make. This seems like steering clear of Scylla by running into the vortex of Charybdis.

I think the appeal should be dismissed, with costs.

Appeal dismissed, with costs.

RE RUSSELL.

Insolvent Act, 1875, secs. 56, 64 and 65—Application for discharge under secs. 64 and 65, after refusal to confirm deed of composition and discharge under sec. 56—Voluntary settlement—Payment to creditor to induce him to execute deed of composition and discharge—Retention and concealment of property by insolvent—Omission to keep proper books of account.

It is no objection to an application by an insolvent for a discharge under secs. 64 and 65 of the Act, that a previous application under sec. 56 to confirm a deed of composition and discharge had been refused, where it appeared that the ground of refusal was that the deed was not executed by a sufficient number of creditors who had proved claims.

Quere, whether an assignee would be justified in reconveying the estate to the insolvent under the directions contained in a deed so insufficiently executed.

A *post nuptial* settlement upon his wife made by an insolvent at a time when he was not aware of his inability to meet his liabilities, and while he had contracts on hand from which he might reasonably have expected to make a profit, though they afterwards proved unsuccessful :

Held, no ground for refusing the insolvent his discharge.

Upon the arrangement for a deed of composition and discharge, the creditors required security for payment of the composition, and one Meikle, a creditor, agreed to indorse the composition notes upon receiving a mortgage upon the property settled upon the insolvent's wife, securing him in respect of his indorsements, and on payment of \$250 in addition to his composition :

Held, not a fraudulent preference within the meaning of the Act.

Upon his appointment the assignee took an inventory of the property, but owing to the execution of the deed of composition and discharge, afterwards declared inoperative, did not remove it :

Held, not a retention or concealment by the insolvent, so as to disentitle him to his discharge ; in such a case the retention and concealment necessary to disentitle an insolvent to his discharge must be wilful and fraudulent.

In order to absolutely disentitle an insolvent to his discharge on the ground of failure to keep proper books of account, where the case is not one of a commercial business, the party opposing the discharge must shew that there were no books ; or, if there were, in what respect they were defective.

THIS was an appeal by a creditor from the judgment of the Judge of the County Court of Stormont, Dundas and Glengarry, whereby he granted to the insolvent a discharge under sections 64 and 65 of the Act, but suspended its operation until the 1st of July, 1882.

The grounds of appeal were :

1. That the insolvent was guilty of fraud and fraudulent preference within the meaning of the Insolvent Act, and was guilty of fraud and evil practice in procuring creditors of the insolvent to sign a certain deed of composition and discharge.

(a) By deed dated 11th September, 1876, he conveyed to trustees for his wife certain real estate at Morrisburgh, at a time when he had many heavy contracts on hand; when he was unable to meet his liabilities, and when he either was aware of such inability or had reason to believe he was about to become financially embarrassed.

(b) To induce one Gordon Casselman, a creditor, to execute a deed of composition and discharge he promised Casselman to pay him in full, and did afterwards pay him nearly the full amount of his claim.

(c) At or about the time he became insolvent he paid to J. & A. Meikle, creditors, the sum of \$400, whereby they procured a preference over the other creditors.

2. The insolvent was guilty of fraudulent retention and concealment of a portion of his estate and effects.

(a) The lands granted to trustees for his wife.

(b) A debt due him from one Chamberlain.

(c) He did in fact retain and apply to his own use the whole of his assets and effects.

Besides other acts of retention and concealment appearing in the evidence.

3. The insolvent did not keep an account-book shewing his receipts and disbursements.

4. The insolvent did not give up his assets and effects to the assignee of his estate, but, on the contrary, after his insolvency, retained them in his own hands and disposed of them for his own benefit.

5. The insolvent having procured the execution of a deed of composition and discharge, and dealt with the estate himself, taking it out of the hands of the assignee, is now precluded from obtaining his discharge under section 64 of the Act.

It appeared that the insolvent made an assignment in insolvency on the 17th of January, 1878.

Soon afterwards, at a meeting of creditors, at which the appellant was present, the creditors, including the appellant, agreed to accept a composition of thirty-three cents in the dollar, to be secured by the promissory notes of the

insolvent, indorsed by J. H. Meikle, one of a firm who were creditors of the insolvent. In order to induce Meikle to agree to indorse, the insolvent and his wife agreed to give, and did give to him a mortgage upon the property comprised in the conveyance, of the 11th September, 1876, whereby the insolvent settled the said property on his wife. The mortgage was to secure Meikle against his indorsations, and also in the payment of \$250 over and above the amount of the composition notes receivable by his firm as creditors under the deed of composition.

In pursuance of the above arrangement a deed of composition and discharge was prepared and signed by what both the insolvent and the assignee considered to be the majority of the creditors under the Act, and the creditors, including the appellant, received their composition notes, which were subsequently paid by Meikle.

The insolvent applied to the Judge for an order confirming the deed of composition and discharge. This was opposed by the appellant alone. It then appeared that a number of the creditors who had signed the deed had not proved their claims before the assignee, and that it was not signed by a sufficient number of those who had proved. The Judge consequently refused to confirm it.

After the expiration of more than a year from the assignment, the insolvent applied for his discharge under sec. 64 of the Act. The application was opposed by the appellant, upon the grounds above set forth, and the Judge thereupon made the order now appealed from.

The other facts sufficiently appear in the judgment.

S. H. Blake, Q.C., for the appellant.

C. Moss, Q.C., contra.

The following authorities were referred to :

Vinden v. Fraser, 28 Gr. 503 ; *Boustead v. Shaw*, 27 Gr. 280 ; *Re Thurbar, Shaw, Young, & Co.*, 11 L. C. Jur. 46 ; *Re Gooding*, 5 A. R. 643 ; *Buckland v. Rose*, 7 Gr. 440 ; *King v. Keating*, 12 Gr. 29 ; *Black v. Fountain*, 23

G. 174; *Re Rathbone*, 2 Bank. Reg. 260; *Re Goodfellow*, 3 Bank Reg. 452; *Re Lamb*, 4 Prac. R. 16; *Re Smith*, 5 Prac. R. 89; *Re Parr*, 17 C. P. 621; *Re Wallis*, 29 U. C. R. 313; *Re Jones*, 4 Prac. R. 317; *Re Holt*, 13 Gr. 568; *Re Thomas*, 15 Gr. 196; *Smith v. Hutchinson*, 2 A. R. 405; *Re Wainwright*, L. R. 19 Chy. Div. 140.

September 23, 1882. BURTON, J. A.—Among other objections taken to the order granting the insolvent's discharge, it is urged that he cannot apply under sec. 64, inasmuch as a deed of composition and discharge was executed, and that the application should have been for an order to confirm the discharge effected by that deed. It is not necessary in this, as I found it unnecessary in another case just decided, (*Re Hill*, ante 693), to consider that objection, inasmuch as the instrument purporting to be a deed of composition and discharge was never operative as a valid deed of composition and discharge, not having been executed by the insolvent, and upon the authority of in *re Garrett*, 28 U. C. R. 273, never became operative, and could not have been confirmed.

The assignee probably was not justified under it in reconveying the estate, but with that we are not concerned at present.

The insolvent applies after the expiration of upwards of three years from the execution of the deed of assignment for his discharge, and is opposed by one of his creditors who executed that instrument proposing a composition, and which composition has been in fact paid.

The first objection is, that a deed given in September, 1876, as a *post nuptial* settlement in favour of his wife was so given when he was unable to meet his liabilities, and when he either was aware of such inability, or there was reason to believe "he was about to become financially embarrassed." I quote the words used in the grounds of appeal.

The question is not whether the deed in question is valid against creditors, but whether it was fraudulent within the meaning of the Insolvent Act.

I think that this objection is disposed of by the finding of the learned Judge, in which I agree, that the insolvent was not at the time of its execution aware of his position : that he had large contracts on hand, from which he may reasonably have expected to make a profit in place of the serious losses which he afterwards met with.

It may be questionable how far it is open to a creditor opposing the discharge under the 64th section, to object that some of the signatures to the deed of composition and discharge which he is not seeking to have confirmed, were obtained by any promise of payment, gift, or preference, as a consideration or inducement to consent to the discharge, or execute such deed of composition ; but I see no reason for differing from the conclusion arrived at by the learned Judge, as the insolvent declares on oath, and is supported by one of the witnesses, that there was no special promise to pay any one as an inducement to execute the deed, but a mere expression on the part of the insolvent of his intention, notwithstanding the composition to pay every one in full.

The payment to Meikle is one which he had a right, legally to exact as a consideration for incurring the responsibility, and cannot, I think, be regarded as a fraudulent preference within the meaning of the Act.

The retention and concealment necessary to deprive him of his discharge, must be a wilful and fraudulent retention and concealment. I do not think the evidence establishes such a state of things here. The assignee was entitled to take possession ; he evidently refrained from doing so, with the knowledge that a deed of composition was being prepared, and although he may have erroneously conveyed back the estate, there is nothing to shew that that was not done in good faith.

Dr. Chamberlain's debt, it is true, was not stated in his schedule of assets, but the accounts were disputed, and according to the insolvent's statement it was of no value.

The most formidable objection is the omission to keep proper books of account. This is not the case of a com-

mercial firm, in which one would expect books to be kept with much more exactness than in a case of this kind. The onus was upon the contestant to shew either that there were no books, or if there were books in what respects they were defective. The insolvent says he kept no regular books of account, but he says he kept a day book. What this book contained is not shewn. It should not be presumed in the absence of evidence that it was not possible to ascertain from the entries in it his receipts and disbursements, and the case therefore would seem to fall within sec. 57, in which negligence in keeping the books is imputable to the insolvent.

I do not consider that an objection of this nature comes with a good grace from a creditor who signed the deed, and has been paid his composition.

I express no opinion as to the position of the assignee in giving up the property under the provisions of a deed which has never been confirmed. I am dealing now only with the insolvent's discharge, and I do not think any sufficient grounds have been shewn for interfering with the order of the Court below. The appeal is therefore dismissed, with costs.

Appeal dismissed, with costs.

RE UNION FIRE INSURANCE COMPANY.

Winding up Act—Practice—Security on appeal—Insurance company.

An appeal under the Act respecting the winding up of Joint Stock Companies, 41 Vic. ch. 5, sec. 27, O., cannot be entertained when security has not been given within eight days from the rendering of the final order or judgment appealed from.

Where a bond good in form with proper sureties was filed with the clerk of the County Court, on the last of the eight days, though not allowed by the Judge:

Held, to be within the words, "given security before a Judge," and a sufficient compliance with the Act, though a person thus filing a bond without allowance risks being deprived of his right of appeal in the event of the bond proving defective.

The Act applies to an Insurance Company incorporated by the Province of Ontario, notwithstanding that ch. 160, R. S. O., provides a separate mode of distributing the deposit made by the company with the Provincial Treasurer.

An order for compulsory winding up, may be made under section 5, notwithstanding a resolution had been passed by the shareholders of the company, providing for the voluntary winding up of the affairs thereof under the supervision of the Directors of the company, and a committee of shareholders appointed by them for that purpose. This not being an extraordinary resolution under sec. 4, sub-s. 3, under the circumstances appearing in the judgment:

Held, that the discretion of the Judge appealed from had not been improperly exercised.

APPEAL from the order of the Judge of the County Court of York (MacKenzie), directing the winding up of this company, which came on to be argued before Burton, J. A., on the 14th June, 1882.

Before the order had been obtained, the company passed a resolution providing for a voluntary winding up of its affairs, by the Directors of the Company and a committee of the shareholders of the company, appointed by the directors for that purpose.

The other facts and the points involved, appear sufficiently in the judgment.

Bain, in support of the appeal.

MacLennan, Q. C., contra.

June 30, 1882. BURTON, J. A.—This is an appeal from an order made by the learned Judge of the County Court of York for the compulsory winding up of this company

under the Ontario Act for the winding up of joint stock companies.

A preliminary objection was taken on the ground that the security required by the 27th section was not given within the eight days named in that section, to which it was answered that that question had been disposed of by Mr. Justice Morrison on a motion to strike out the appeal. I have conferred with my learned brother, and find that he abstained from any opinion upon the question, simply declining to strike out the appeal, but leaving the respondents at liberty to raise the question on the argument of the appeal.

It appeared to me upon the argument, and I still retain the opinion, that if the security had not been given until after the eight days, this Court could not have entertained the appeal. The terms of the Act of Parliament are prohibitory, and leave no discretion in the Court, and it may be questionable, as was suggested in *Retemeyer v. Obermuller*, 2 Moo. P. C. C. 99, whether the omission could be cured by any waiver or implied consent on the part of the respondents.

In the present case a bond, with sureties admittedly sufficient, was filed with the clerk of the Court on the last of the eight days, and I am called upon to place a construction upon the words, "given security before a Judge," which have unfortunately been imported into our Ontario statute from the Insolvent Act, terms which perhaps have a well understood meaning in the Province of Quebec, but which are not familiar to us in this Province.

I should have supposed that they meant allowed by the Judge; but in view of the shortness of the time allowed, and the frequent absence from the county town of the Judge in the discharge of his judicial duties, I feel disinclined, unless compelled to do so, to place so strict a construction upon the language employed, although I think it is to be regretted that words more readily understood had not been used.

I think I must hold that a bond which is now shewn to be good in form, and executed by sureties admitted to be sufficient, was good at the time it was filed in the proper Court, and was sufficiently before the Judge for this purpose, although it is needless to add that a party so acting, without getting the bond allowed by the Judge before filing, is exposed to the risk of being deprived of his right to appeal in the event of the bond proving ultimately defective in any particular.

I proceed, then, to consider the case on the merits. Mr. Bain contends that notwithstanding the generality of the second section, this Act was not intended to apply to insurance companies, basing his contention chiefly upon its inconsistency with the 21st section of the Insurance Act, R. S. O. ch. 160, which provides for the administration of the deposit with the Government required by that Act in the mode there pointed out by the Court of Chancery.

It does not strike me that there is much force in the objection, although there is room perhaps for legislative action so as to render it unnecessary to resort to two tribunals when a company is in liquidation.

The petition for the winding up in this case was presented on the 24th of November, to be heard on the 30th of the same month, and in the interval a policy-holder filed a bill in Chancery seeking to administer the fund in the hands of the Provincial Treasurer, upon which a consent decree was obtained, and an order appointing a receiver made on the 29th.

It was filed by parties claiming to be contributories, and said to represent a fifth of the whole stock, and it is opposed on two grounds:—

1st. That in view of the proceedings now going on in Chancery it is not "just and equitable" that the order for winding up compulsorily should be made; and

2nd. That there was no power in the learned Judge to make the order, inasmuch as the right to wind up compulsorily only arises where no such resolution as is before referred to in the Act has been passed.

It may be well to deal with the last objection first, as if well founded it will be unnecessary to consider the other.

Section 4 of the Act contains the provisions which declare when companies may be wound up.

Sub-section 1 provides that where the period fixed for the duration of the company by its charter has expired, or the event has occurred, upon the happening of which it is provided by the charter that the company is to be dissolved, and the company in general meeting has passed a resolution requiring the company to be wound up, neither of which contingencies has arisen in this case.

Sub-sec. 2: Where the company has passed a special resolution—that is to say, a resolution passed by a majority of not less than three-fourths of such members of the company for the time being entitled to vote as may be present in person or by proxy at any general meeting, of which notice specifying the intention to propose such resolution has been duly given, and having been passed has been confirmed by a majority of the members entitled to vote at a subsequent general meeting, of which notice has been duly given, and held at an interval of not less than fourteen days, nor more than a month from the date of the meeting at which the resolution was first passed requiring the company to be wound up.

And sub-section 3: Where the company (though it may be solvent as respects creditors) has passed an extraordinary resolution—that is to say, a resolution passed in the manner above referred to as necessary for a special resolution, though without the confirmation necessary for it, to the effect that it has been proved to their satisfaction that the company cannot, by reason of its liabilities, continue its business, and that it is advisable to wind up the same.

It is not pretended that any special resolution was passed under sub-sec. 2, and it cannot be successfully contended that the resolution which was passed was an extraordinary resolution within sub-sec. 3, or to the effect there mentioned.

It is clear, therefore, that the learned Judge had power

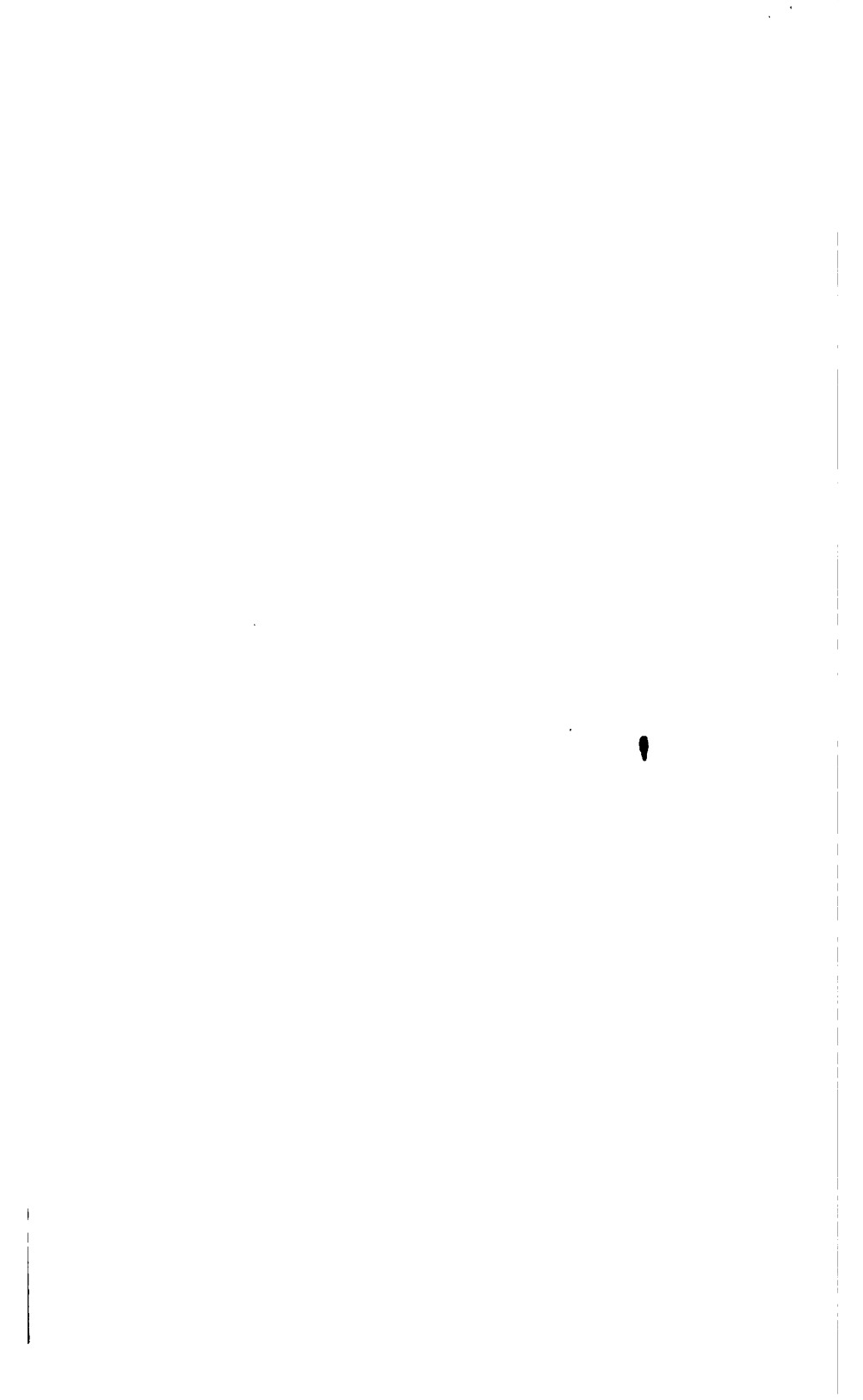
to entertain the petition under the 5th section, and I find it impossible to say, when confronted by a petition for a compulsory winding up signed by contributories to the extent of one-fifth of the whole stock, that the discretion of the learned Judge has been improperly exercised.

Assuming for the moment that the Court of Chancery has jurisdiction to wind up a company like the present, for which, however, the case of *Harris v. The Dry Dock Co.*, 7 Gr. 455, and the other cases cited are not satisfactory authorities, it is to be assumed that the Legislature saw that practical difficulties existed in the way of working out such suits, and therefore passed the Act in question.

Nor can the majority of the members, however great bind the minority as to winding up the company, apart from the statute. A partnership, whether great or small, is an association based and depending entirely on the agreement of its members, and it is competent for *all* those members at any time to vary the agreement and change the whole objects of the partnership, but with respect to companies created by Special Act of Parliament the case is very different, for it is governed by a law defining its object and limiting its powers.

The shareholders, who are petitioners in the present case, may have good reasons for desiring to have the company wound up and dissolved, and have satisfied the Judge below of their right to the order, and I think I should not properly discharge my duty as an appellate tribunal if I interfered with his discretion. The appeal should, therefore, be dismissed with costs.

Appeal dismissed, with costs.



A DIGEST

OF

ALL THE REPORTED CASES

DECIDED IN

THE COURT OF APPEAL,

DURING PARTS OF THE YEARS 1881 AND 1882.

ACCIDENT POLICY.

Accident Policy—Voluntary Exposure to risk—Practice.—An appeal from the Court of Common Pleas, who ordered a nonsuit after verdict for the plaintiff (31 C. P. 394), the Court being equally divided, was dismissed, with costs. *Neill v. The Travellers' Insurance Company*, 570.

2. *Per* HAGARTY, C. J., and CAMERON, J.—The evidence shewed that the deceased had voluntarily gone unnecessarily into a place of danger. *Ib.*

3. *Per* BURTON and PATTERSON, JJ. A.—In an action upon an accident policy the plaintiff having proved a claim *prima facie* within the policy, it was for the defendants to shew that the deceased voluntarily exposed himself to unnecessary danger or one of the other defences set up. The nonsuit, therefore, was improper, and a new trial should have been granted. *Ib.*

4. One of the conditions of the policy was, that the insured should not stand or walk on a railway track.

Per CAMERON, J., and *semble per* HAGARTY, C. J.—Such condition was broken by the insured driving on, not simply crossing, a railway track in a buggy.

Per BURTON, J. A.—Such condition was intended to apply to the case common in Canada of persons using the railway tracks as roadways, and could not be considered as applying in every case of an accident to the insured while on such track. *Ib.*

ACCUMULATION OF FUND.

See DEVISE TO GOVERNMENT OF FOREIGN STATE.

AFFIDAVIT OF BONA FIDES.

See CHATTEL MORTGAGE, 1.

AFTER-ACQUIRED PROPERTY.

Crops to be sown upon certain land may be the subject of sale as any other after-acquired property, and the property in them will pass when sown, if they are so described as to be capable of being identified when acquired. *Grass et al. v. Austin*, 511.

AGENT OF MORTGAGEE.

See CHATTEL MORTGAGE, 1.

AMENDMENT IN COURT BELOW.

See COUNTY COURT APPEAL, 1.

APPEAL.

See QUO WARRANTO.

APPLICATION FOR DISCHARGE OF INSOLVENT.

See INSOLVENT ACT, 3.

ASSESSING DAMAGES.

See TAVERN KEEPER, 2.

ASSIGNMENT FOR BENEFIT OF PARTNERSHIP CREDITORS.

Assignment for benefit of partnership creditors—Separate creditors—Parol evidence—Void deed.—Two persons carried on business under the name of "G. & W." Having become unable to pay their liabilities, they

made an assignment to the plaintiffs of all their partnership effects and of all the personal effects of G., "other than wearing apparel," in and about the dwelling-house of G., in trust to pay all the creditors of "G. & W."

Held, [affirming the judgment of the C. P., 32 C. P. 68,] that the deed was void, in consequence of providing for the payment of partnership creditors only; and parol evidence was not admissible to prove that the object of the parties, in making the assignment, was to provide for the payment of separate as well as partnership creditors. *Mills et al. v. Kerr et al*, 769.

ASSIGNEE RE-CONVEYING ESTATE TO INSOLVENT.

See INSOLVENT ACT, 7.

BILL OF EXCHANGE.

See PRINCIPAL AND SURETY.

BILLIARD TABLES.

See BRITISH N. A. ACT, 1.

BOARDING-HOUSE-KEEPER

See REPLEVIN, 2.

BOOKS OF ACCOUNT, OMISSION TO KEEP.

See INSOLVENT ACT, 11.

BRIDGE COMPANY.

1. *Bridge company — Corporate powers — Tolls — Reasonableness of tolls—Reference to Master of questions proper for Court—Duty of junior counsel.*] *Held*, affirming the judgment of the Court below (28 Gr. 114), that it is incident to the corporate powers of a corporation of the character of the International Bridge Company, incorporated under 20 Vict. ch. 227, and 22 Vict. ch. 124, to demand payment of tolls from railway companies for the use of their bridge.

Held, also, that the tolls payable for the passage of trains are not fixed by the said Acts. *The International Bridge Company v. The Canada Southern Railway Company*, 226.

2. The dividends paid by the Bridge Company were adopted at the Bar as a test of the reasonableness of tolls charged. It was shewn by the evidence of eminent engineers that the construction of the bridge was an exceptionally difficult undertaking, that the bridge when complete was exposed to extraordinary risks and dangers, and that a large sinking fund was necessary to provide for unforeseen contingencies; and the Court was satisfied that the omission to provide such a fund would be improvidence on the part of the directors.

Held, that a sinking fund was, therefore, a proper and reasonable charge against the annual income; that upon the evidence the Court could not declare that a point of unreasonableness had been reached when they should relieve against overcharge, assuming it to be competent to the Court so to declare and relieve; that a dividend of six per

cent. per annum on capital laid out in such an enterprise would be unreasonably small, but that it was not necessary for the Court to say what would be reasonable. *Ib.*

[Affirmed by the Privy Council, 4th July, 1883.]

BRITISH NORTH AMERICA ACT.

[CONSTRUCTION OF.]

B. N. A. Act, construction of.—Provincial Legislatures, power of, to imprison with hard labour—Delegation of the powers of Legislature to License Commissioners under the B. N. A. Act—Tavern licenses—Billiard tables.]—The Legislatures of the Provinces having been assigned the sole power of passing laws for the infliction of penalties and imprisonment for the due enforcement of a law of the Province in relation to a matter with which it alone has power to deal, and the granting of licenses for the keeping of public houses and billiard tables for hire, being subjects over which the Provincial Legislature has exclusive jurisdiction.

Held, (1) That the enactment of the statute, (R. S. O. ch. 181,) restricting the hours within which billiard rooms in inns should be kept open, was not *ultra vires*; and (2) [in this reversing the judgment of the Court below,] that the Provincial Parliament had power to delegate to the License Commissioners certain powers in order to the carrying out of its legislation upon particular subjects. *Regina v. Hodge, and Regina v. Frawley*, 246.

2. The power of the Provincial Legislatures to pass laws for the purpose of compelling obedience to those enactments respecting subjects which

by the B. N. A. Act, are assigned specially to those bodies, is inherent in them aside from the 92nd section of the Act. *Ib.*

3. The word "imprisonment" used in that section does not necessarily exclude the imposition of hard labour as part of the punishment. Therefore:

Held, [reversing the judgment of the Court below,] that the Legislature of this Province has power to impose hard labour in addition to imprisonment. *Ib.*

4. By clause 8 of the 92nd section of the B. N. A. Act, exclusive power is given to the Provincial Legislatures to make laws in relation to "Municipal Institutions in the Province," and clause 9 gives similar power in relation to "Shop, Saloon, Tavern, Auctioneer, and other licenses, in order to the raising of a revenue for Provincial, Local, or Municipal purposes."

Per SPRAGGE, C. J. O., that clause 9 is cumulative to clause 8, and was intended to authorize provincial legislation in relation to licenses, for the purpose of raising a revenue as well as for the regulation of matters of police. *Ib.*

CHATTEL MORTGAGE.

1. *Chattel mortgage—Agent of mortgagee—Affidavit of bona fides—Purchaser from mortgagee—Refiling mortgage—Registering bill of sale from mortgagee.*]—B., the customer of a bank, executed a chattel mortgage on his household effects, by way of collateral security, in favour of the bank, which was allowed to run into default, whereupon the mortgagees proceeded to a sale, and appointed W.

their bailiff for that purpose, who had the property appraised, and sold it to the plaintiff, a creditor of B., by private sale, for \$900; and executed a bill of sale thereof. The plaintiff, in his evidence, swore that B. owed him about \$1,000, and he thought there was ample security for the \$900 and also additional security for B.'s indebtedness to himself, and that the goods seemed to be worth about \$5,000; and the plaintiff, without disturbing in any way the possession of B., rented the property to him, and he remained, as he had theretofore been, in possession.

In order effectually to carry out the proposed arrangement with B., the bank by special power appointed their local manager agent to accept the chattel mortgage, and as such agent to make the affidavits required to be made by mortgagees.

Held, (1) [reversing the judgment below] that it need not appear on the affidavit, or the mortgage, or the papers filed therewith, that the agent was aware of the circumstances connected with such mortgage.

Held, (2) [PATTERSON, J. A., dissenting] that as under the circumstances stated the chattel mortgage was satisfied *quoad* the goods, the mortgage could not properly be refiled; and notwithstanding the continued possession of the mortgagor (B.) it was not necessary for the plaintiff to file a bill of sale from the bank to himself in order to preserve his rights as against execution creditors of, or *bona fide* purchasers from B. (the mortgagor). *Carlisle v. Tait*, 10.

2. *Chattel mortgage—Registration—R. S. O. ch. 119—Sunday—Future advances—Time of payment.*]—A chattel mortgage was duly executed

on the 12th of July, and filed on the 18th, the 17th having been Sunday:

Held [affirming the judgment of the County Court], that such registration was too late. the Act, R. S. O. ch. 119, requiring the same to be effected within five days from the execution of the instrument; that Sunday counted as one of such five days, and that Rule 457, O. J. A., did not apply. *McLean v. Pinkerton*, 490.

3. The mortgage, besides being a security for \$1,400 actually advanced, provided that it should also be a security for further advances, if necessary, of goods and merchandize to enable the mortgagor "to carry on business,"—not "to enter into and carry on" as in the statute,—which should "be re-paid on demand at any time within one year from the date hereof, or such other time as the parties may agree thereto."

Held, that the omission of the words "to enter into" could not render it unnecessary to register the mortgage, as regarded the \$1,400.

Quære, per WILSON, C. J., whether the clause for future advances was not void as enabling payment to be delayed beyond the year. *Ib.*

4. *Chattel mortgage—Description—After acquired property.*—M., owning parts of lot 13 and 14 in the 2nd concession of Murray, gave a chattel mortgage of certain crops, grain, hay, &c., described as "now being on the premises, situate on the north-east half of lot 14 in the 2nd concession, and north half of lot 14 in the said concession of Murray."

Held, that crops and hay upon lot 13 could not pass. *Grass et al. v. Austin*, 511.

5. *Chattel mortgage—Notice—Religious society—R. S. O. ch. 95, sec. 13.*—The trustees of a church had been sued by the defendant, and pending the action they passed a resolution authorizing the raising by loan of \$400 to pay off urgent claims, which recited that it was necessary to give security to the party making the advance. The plaintiff, being one of the trustees, thereupon advanced the money, obtaining from the trustees a chattel mortgage on all the movables contained in the church, which was prepared by a partner of the general solicitor of the trustees, who was defending the action against them, but neither partner was called as a witness on the trial. In an interpleader issue the learned Judge found for the defendant.

Held, [BURTON, J., *dubitante*] affirming the decision of the Common Pleas Division, that the mortgage was not invalid under R. S. O. ch. 95, sec. 13, and the fact that all the movable property of the mortgagors was included in the security was not of itself sufficient to satisfy the Court of any fraudulent intent in making it.

Held, also, that the mere fact of the mortgage having been prepared by the partner of the solicitor for the trustees, was not of itself sufficient to impute to the plaintiff knowledge of the pending action against the trustees.

Held, also, that the fact of the plaintiff being himself one of the trustees, to which position he had been appointed about three or four months before the advance had been made, was not sufficient to fix him with knowledge of the pendency of the action in face of his sworn statement that he was ignorant thereof.

Held, also, that the trustees had power to borrow the money and secure it by the chattel mortgage. *Brown v. Sweet*, 725.

CLAIMANT NOT APPEAR- ING.

See INTERPLEADER SUIT.

CONSTITUTIONAL LAW.

See BRITISH NORTH AMERICA ACT.

CONTRACT.

1. *Contract—Time.*]—The plaintiffs and defendants entered into an agreement in the following terms: "I, the undersigned, agree to deliver S. S. Mutton & Co., 40 M. ft. blk. ash, with mill-culls out, f. o. b. vessel on Cornwall canal, at \$10 per M. ft. Also 10 M. ft. soft elm at \$10 per M. ft. f. o. b. vessel on Cornwall canal, to be delivered in the month of June, 1881, the lumber now on stick and part seasoned," and the plaintiffs signed a corresponding memorandum, agreeing to accept such lumber at the time specified.

Held, that the words "with mill culls out," applied to the ash only, not to the elm.

Held, also, that the plaintiff, not having had a vessel ready to receive the lumber in June, could not recover.

Per OSLER, J. Time was of the essence of the contract, and the defendant was not bound to deliver the lumber in September. *Mutton v. Dey*, 455.

2. *Contract—Excuse for non-performance—Corporate seal—Costs.*]

—Where the plaintiff was engaged by the defendants for "the season," i. e., from early in May till some time in November, as master to manage the steamer *Idyl-Wyld*, for \$1,000, and he continued so employed until September, when the steamer was burnt:

Held, that the plaintiff was not entitled to more than a proportionate share of the salary agreed upon, for the contract was subject to the continued existence of the vessel, and performance was excused by its destruction without the default of the defendants. *Ellis v. The Midland Railway Company*, 464.

Semble, that such a contract made verbally with the president of the defendant company might be binding; and that a nonsuit for want of the corporate seal was properly set aside. *Ib.*

CONTRACT OF TRUSTEES.

See PUBLIC SCHOOLS ACT.

CONTRIBUTORY NEGLIGENCE.

Collision at crossing—Contributory negligence.]—The servant of the plaintiff was in charge of an omnibus running to and from the station of the defendants' railway, and on the evening in question was attending at Georgetown station, at about ten feet from the track, but was unable to see along the railway in either direction by reason of houses intervening. By leaving the omnibus, however, and going to the track he could have seen an approaching train; but omitting to take this precaution, although aware that a

freight train was then on the track near the crossing, he started off to cross it, and did not hear or see anything of the approaching train until within about four feet of him, when he was unable to avoid it, and the 'bus and harness were considerably damaged. It was not shewn that the driver of the train had given any warning of its approach by sounding the whistle or bell on its nearing the part of the track where it crossed the road to the station. At the trial the plaintiff was nonsuited on the ground of the contributory negligence of the plaintiff's servant.

Held, on appeal, [reversing the judgment of the County Court,] that the question of contributory negligence had been improperly withdrawn from the jury, and that a new trial must be had in order to submit that question to them. *Bennet v. The Grand Trunk Railway Company*, 470.

CONVEYANCE FOR VALUE.

Conveyance for value—Hindering creditors—13 Eliz., ch. 5.—The male defendant mortgaged his property several times, and finally sold the equity of redemption. His wife barred her dower in each mortgage, under an agreement with her husband, made on the first occasion, that he would convey other property to her. Upon this claim being reiterated on the sale of the equity of redemption, the husband conveyed the other land to a trustee for her. The effect was that the plaintiff, a creditor of the husband, was delayed and hindered in recovering his debt.

Held, [affirming the decision of the Court below,] that the conveyance to the wife's trustees was not volun-

tary; and as the transaction had been found to have been *bonâ fide*, and without intent to defraud creditors, it could not be impeached under 13 Eliz. ch. 5. *Beavis v. Maguire*, 704.

CONVEYANCE OF LAND TO RAILWAY COMPANY.

The deed to the defendant company described it by its original name of P. H. L. & B. R. Co., when in fact its name had then been changed.

Held, a sufficient *descriptio personæ*, to enable the company to take, though it might not be sufficient to sue in. *Grand Junction Railway Co. v. Midland Railway Co.*, 681.

CORPORATE POWERS.

See BRIDGE COMPANY.

CORPORATE SEAL.

See CONTRACT 3.

COSTS.

When an appeal was allowed on a ground raised for the first time on the argument no costs were given. *Ellis v. The Midland Railway Company*, 464.

COUNSEL.

See JUNIOR COUNSEL.

COUNTY COURT APPEAL.

County Court appeal—Remission to Court below for amendment—Dis-

cretion of Court below as to amending.]

—This case had been remitted to the Court below, this Court being of opinion that the record should be there amended and a verdict entered for the plaintiff against the defendant B. alone (6 App. R. 411). The learned Judge of the County Court, instead of entering such a verdict, directed a new trial, the parties to apply to amend their pleadings as they might be advised, so that B. might raise any defence which he was not obliged to raise in the action on the joint liability.

Held, that the direction of the learned Judge of the County Court as to the way in which he thought it most just to the defendant B. that the application to amend should be made, was an exercise of his discretion with which this Court would not interfere. *Wilson v. Brown & Wells*, 181.

COVENANTS, NOT STATUTORY.

See LEASE, SHORT FORM OF.

CREDITOR, PAYMENT TO.

[TO INDUCE HIM TO EXECUTE DEED OF COMPOSITION AND DISCHARGE.]

See INSOLVENT ACT, 9.

CREDITORS, RIGHTS OF.

See STATUTE OF LIMITATIONS.

DELEGATION OF POWERS OF LEGISLATURE TO LICENSE COMMISSIONERS.

See BRITISH NORTH AMERICA ACT 1.

DESCRIPTIO PERSONÆ.

See CONVEYANCE OF LAND TO RAILWAY CO.

DESCRIPTION.

See CHATTEL MORTGAGE, 4.

DEVISE TO GOVERNMENT OF FOREIGN STATE.

Devise to government of Foreign State—Supervision of Trusts.—A testator directed his executors to pay and deliver the residue of his estate to the Government and Legislature of the State of Vermont, to be disposed of as to them should seem best, having regard to certain recommendations set forth in the will.

Held, [affirming the decree, 27 Gr. 361,] that the State was sufficiently designated as the legatee to entitle it to take the bequest; and the fact that the bequest was for the benefit of, and to take effect in a foreign country, could not be urged as an objection to its validity; neither could the objection that the State could not be made amenable to the Courts of the State, and thus there would not be any supervision of the trusts, as it must be assumed that a sovereign State would not do anything to violate a trust; besides which it appeared that the Legislature was not, in reality, to assume the trust, their duty being to appoint trustees who would be amenable to the Courts.

Held, also, that the direction for accumulation did not render the bequest invalid, it being for the Courts in Vermont to say whether the direction should be carried out. *Parkhurst v. Roy*, 614.

DISAFFIRMING SALE.

See REPLEVIN, 1.

DISCHARGE, APPLICATION FOR

[AFTER REFUSAL TO CONFIRM DEED OF COMPOSITION AND DISCHARGE.]

See INSOLVENT ACT. 6.

DISTRESS.

See REPLEVIN, 2.

DISTURBANCE OF FERRY.

See FERRY, &c.

EJECTMENT.

Ejectment—Statute of Limitations—Constructive possession—Title—Trespass—Actual and visible possession.—The judgment of the Court of Common Pleas (30 C. P. 484) affirmed as regards the rights of the defendant under the Statute of Limitations to that portion of the land of which *actual possession* had been shewn for forty years ; but varied by entering judgment for the plaintiff for the rest of the land sued for. *Harris v. Mudie*, 414.

See also LIFE LEASE.

ENTRY.

See STATUTE OF LIMITATIONS 1.

EQUITY OF REDEMPTION.

See MORTGAGE, &c., 1.

EVICTIION.

See LANDLORD AND TENANT.

EVIDENCE AFTER VERDICT

[APPLICATION TO GIVE.]

See PRACTICE 5.

FERRY, CONSTRUCTION OF LICENSE TO.

Disturbance of ferry—Construction of license to ferry.—The Crown granted a license to the town of Belleville, giving the right to ferry "between the town of Belleville to Ameliasburg."

Held, sufficient to warrant the Court in assuming that between the one place and the other was meant. *Jellett v. Anderson, et al.* 341.

Under the authority of this license the town of Belleville executed a lease to the plaintiff, granting the franchise "to ferry to and from the town of Belleville to Ameliasburg," a township having a water frontage of about ten or twelve miles, directly opposite to Belleville, such lease providing for only one landing place on each side.

Held, [affirming the decree of the Court of Chancery 27 Gr. 411] that this was a sufficient grant to the licensee of a right of ferriage *to and from* the two places named ; and the defendants having started a ferry some two miles west of Belleville, running to a point nearly opposite in Ameliasburg, was such a disturbance of the plaintiff's franchise, as entitled him to a declaration of a right to the exclusive use of the ferry.

HAGARTY, C. J., dissenting, who considered that Ameliasburg having

such an extensive frontage opposite Belleville, it was unreasonable, even if the plaintiff's claim of a right to ferry to and fro was good, to require that a person crossing from that township should be compelled to go to Belleville, although his destination might be several miles therefrom and that by the terms of the license and lease the right of the plaintiff was only to ferry one way. *Id.*

[Reversed by Supreme Court, May, 1883.]

FIRE.

Fire — Negligence—Jury, submitting questions to—Practice.]—Where fire has been properly set out by a person on his land for the necessary purposes of husbandry, at a proper place, time, and season, and managed with due care, he is not responsible for damage occasioned by it. But where the defendant, while harvesting in his own field, threw upon the ground a lighted match thinking he had extinguished it, which however set fire to combustible material, and the defendant on afterwards discovering it, though he could easily have put it out, after confining it to one spot left it, anticipating no danger, and after burning for four or five days, the fire spread to the plaintiff's premises, and destroyed his barn with a quantity of grain and hay, the Court in reversing the decision of the Queen's Bench, considered that the principle and doctrine established in *Fletcher v. Rylands*, L. R. 3 H. L. 330, and *Jones v. Festiniog R. W. Co.*, L. R. 3 Q. B. 733, applied; and that the defendant was liable for the damage sustained by the plaintiff, even in the absence of actual negligence. *Gaston v. Wald*, 19 U. C. R. 586, doubted. *Furlong v. Carroll*, 145.

FOREIGN STATE—DEVISE TO GOVERNMENT OF.

See DEVISE, &c.

FORFEITURE OF POLICY.

See LIFE INSURANCE.

FORM OF CONVEYANCE TO RAILWAY COMPANY.

See RAILWAY COMPANY, 1.

FRAUDULENT CONVEYANCE.

Fraudulent conveyance—Insolvent Act — Marriage.]—In November, 1876, a marriage being contemplated between the defendant and M., the defendant's father proposed that M. should erect a house, which he intended building, on a lot belonging to the father, who agreed to convey the same to his daughter as a marriage portion. This M. assented to, and in that month the marriage took place. During the year following M. built the house, and his father-in-law conveyed the lot to the defendant as had been previously agreed upon. In January, 1880, M. became insolvent, and proceedings were taken by his assignee to have the transaction declared fraudulent as against creditors, under the 132nd section of the Insolvent Act, 1875; or under the 13th Elizabeth, ch. 5.

Held, [affirming the decree of Proudfoot, V. C. 27 Gr. 483] that no fraudulent intention was shewn on the part of M., and any knowledge by the defendant or her father was distinctly negatived by the evidence, and therefore the

transaction could not be impeached under either statute.

Jackson v. Bowman, 14 Gr. 156, remarked upon, distinguished and approved of. *Davidson v. Maguire*, 98.

FRAUDULENT PREFERENCE.

See INSOLVENT ACT 1, 9.

FRAUDULENT PURCHASE.

See REPLEVIN, 1.

FUTURE ADVANCES.

See CHATTEL MORTGAGE, 3.

GARNISHING EQUITABLE CLAIM.

Garnishing equitable claim—Receiver—Judicature Act—Rule 370.

—G. was entitled under the will of C. to a life estate in land, and to the proceeds of personalty to be paid to her by the executors. Judgment creditors of G. had had a *fi. fa.* goods returned *nulla bona*, but had not sued out a *fi. fa.* lands, when a receiver was appointed to the estate of C., whereupon the judgment creditors by petition, before the passing of the Ontario Judicature Act, applied for an order that the receiver might be directed to pay their judgment out of G.'s money in his hands; or that they might attach and sell G.'s life estate; or that the tenants of the realty might be directed to attorn to the petitioners, and that they might be put in receipt of the rents and profits.

Held, [on appeal from Proudfoot, V. C.] that such petition had been properly dismissed, for the creditors were not in a position when they presented it either to garnish the personal estate, if that could have been done under the A. J. Act, 1873, or to seize the real estate under execution; and they had therefore no rights which the appointment of a receiver interfered with.

But, *Held*, following *Re Cowan's Estate*, 14 Ch. D. 638, that the petitioners might now garnish the moneys in the hands of the receiver; and it being alleged that a *fi. fa.* lands had since issued, the Court upon payment of costs granted leave to the petitioners, under the prayer for general relief, to sue out such writs as they might be advised. *Leeming v. Woon*, 42.

GRANT, CONSTRUCTION OF.

Grant, construction of—Statute of Limitations.—Two several lots were conveyed by the deed in trust set out in the bill to G. and A. respectively to the use of G. and A., their heirs and assigns, as joint tenants and not as tenants in common.

Held, that under the provisions of such deed, the grantees took the respective lots in severalty.

Held, also, (affirming the judgment of SPRAGGE, C., 23 Gr. 221,) upon the facts there stated, that the tenant of an equitable tenant for life, in setting up the Statute of Limitations against the equitable remainderman, could not be allowed to compute the time during which he had been in possession prior to the death of the tenant for life.

Per BURTON, J. A.—The owner of an equitable estate cannot, notwithstanding the Judicature Act,

proceed against a trespasser in his own name. He is still bound to sue in the name of his trustee.

The Provisions of the Statute of Limitations as regards equitable estates considered.

Per PATTERSON, J. A.—Under the circumstances appearing in this case the plaintiff was entitled to recover in respect of the equitable estate. *Adamson v. Adamson*, 592.

GRANT OF LAND.

[IN CONSIDERATION OF ERECTING A STATION.]

See RAILWAY COMPANY.

HARD LABOUR,

[POWER OF PROVINCIAL LEGISLATURES TO IMPRISON WITH, 7.]

See BRITISH NORTH AMERICA ACT, 4.

HINDERING CREDITORS.

See CONVEYANCE FOR VALUE.

ILLEGALLY ISSUED STOCK.

See SCIRE FACIAS, 1.

INDEMNITY.

See MORTGAGE, &c. 1.

INDEPENDENT ADVICE.

See VOLUNTARY CONVEYANCE.

INNOCENT PURCHASER.

See TRUSTS, &c. 1.

INSOLVENT ACT.

1. *Insolvent Act of 1875—Unjust preference—Fraudulent preference—Presumption of innocence.*—D. had been in the habit of obtaining from the defendant discounts, at an exorbitant rate of interest, of notes received by D. in the course of his business, very few, if any, of which were paid at maturity; so that in the course of about two years' dealings D.'s indebtedness amounted to about \$7,000. At this time D., who was represented as a man of very sanguine temperament, entered into a new line of business after obtaining goods on credit to the amount of \$4,000 or \$5,000, having represented to the persons supplying such goods that, although without any available capital, he had experience in business. About twelve days afterwards, D., being threatened by a mortgagee with foreclosure proceedings, which, if persisted in, would have had the effect of closing up his business, applied to the defendant, who advanced him \$300, part of which was applied in paying the overdue interest on the mortgage, and the surplus in retiring a note of D.'s held by the defendant, who granted D. an extension of time on other notes held by himself at a reduced rate of interest (if paid promptly); and the defendant then intimated to D. that he would have to work carefully to get through. In a suit impeaching the mortgage to the defendant, it was

Held, [reversing the decree pronounced by Spragge, C.] that the plaintiff had not satisfied the *onus*, which was cast upon him by the Insolvent Act, of shewing that the mortgage given by D. had been so given in contemplation of insolvency; and, the presumption of law being in favour of innocence and fair deal-

ing, the bill was dismissed, with costs. *McCrae v. White*, 103.

2. *Insolvent Act of 1875—Application for discharge—Non-disclosure of causes of insolvency—Defective books.*—The insolvent, nine months before his insolvency, stated to the contestant that he had a surplus of \$40,000. When he failed it appeared that there was a deficiency of about that amount, the difference not being satisfactorily, if at all, accounted for. He did not produce all his books, but it was proved that they were kept in such a manner that they would not shew the true state of his affairs. The cash book had never been balanced, and no balance sheet was ever made out; bills were discounted which did not appear in any of the books, and goods were transferred from his wholesale to his retail place of business without entry in the books that were kept.

Held, reversing the order of the Judge below granting a discharge to the insolvent, (1) that, though an insolvent may be guilty of the offence of not fully, clearly, and truly stating the causes of his insolvency, that is no ground for refusing the discharge, even after a conviction for the offence; (2) that the omission to keep any books prevents the Judge from granting a discharge, whether the intent be fraudulent or not; but (3) when they have been kept, it is not essential, on the one hand, that they should be kept in the most approved form, nor are they sufficient, on the other, however carefully kept in some respects, if they fail to exhibit the insolvent's exact position; (4) that under the facts in this case the insolvent was not entitled to his discharge.

Liberty to the insolvent to renew the application was given if he should

be so advised on his producing the remainder of his books. *In re Hill*, 694.

3. *Semble*, that if an insolvent obtains the consent of the required number of creditors, or the execution of a deed of composition and discharge, he may at once make the application without waiting for the expiration of a year: he is not precluded, however, from applying after the expiration of a year, under the 64th section of the Insolvent Act (1875). *Ib.*

4. *Insolvent Act of 1875—Unjust preference.*—K. had a line of discount with the defendants of \$20,000, for which \$5,000 collaterals were deposited as security. Sometime afterwards his indebtedness to the bank was nearly doubled when the agent insisted upon obtaining additional security by deposit of further collaterals, and which some months before the insolvency were deposited. This was impeached by the assignee in insolvency of K. as being an unjust preference of the bank.

Held, affirming the decision of the Court below, that the transfer to the defendants, of the securities as collaterals was valid, the plaintiff having failed to establish that K contemplated insolvency:

Held, also, that the want of knowledge by the defendants' manager would not have availed the defendants, if the insolvent had in fact, made the transfer in contemplation of insolvency. *Nelles v. The Bank of Montreal*, 743.

5. The insolvent made a cash payment of \$1,000 to the bank a few days before his insolvency, but it was sworn that he had been allowed to overdraw upon an agreement to

cover it by this payment, and it was not shewn that the bank manager had, at that time, probable cause to believe in his inability to meet his engagements in full :

Held, that this money could not be recovered back. *Ib.*

6. *Insolvent Act, 1875, secs. 56, 64, and 65—Application for discharge under secs. 64 and 65, after refusal to confirm deed of composition and discharge under sec. 56—Voluntary settlement—Payment to creditor to induce him to execute deed of composition and discharge—Retention and concealment of property by insolvent—Omission to keep proper books of account.*—It is no objection to an application by an insolvent for a discharge under secs. 64 and 65, of the Act, that a previous application under sec. 56 to confirm a deed of composition and discharge had been refused, where it appeared that the ground of refusal was that the deed was not executed by a sufficient number of creditors who had proved claims. *Re Russell, 777.*

7. *Quære*, whether an assignee would be justified in reconveying the estate to the insolvent under the directions contained in a deed so insufficiently executed. *Ib.*

8. A *post nuptial* settlement upon his wife made by an insolvent at a time when he was not aware of his inability to meet his liabilities, and while he had contracts on hand from which he might reasonably have expected to make a profit, though they afterwards proved unsuccessful.

Held, no ground for refusing the insolvent his discharge. *Ib.*

9. Upon the arrangement for a deed of composition and discharge,

the creditors required security for payment of the composition, and one Meikle, a creditor, agreed to indorse the composition notes upon receiving a mortgage upon the property settled upon the insolvent's wife, securing him in respect of his indorsements, and on payment of \$250 in addition to his composition.

Held, not a fraudulent preference within the meaning of the Act. *Ib.*

10 Upon his appointment the assignee took an inventory of the property, but owing to the execution of the deed of composition and discharge, afterwards declared inoperative, did not remove it.

Held, not a retention or concealment by the insolvent, so as to disentitle him to his discharge; in such a case the retention and concealment necessary to disentitle an insolvent to his discharge must be wilful and fraudulent. *Ib.*

11. In order to absolutely disentitle an insolvent to his discharge on the ground of failure to keep proper books of account, where the case is not one of a commercial business, the party opposing the discharge must shew that there were no books, or if there were in what respect they were defective. *Ib.*

See also FRAUDULENT CONVEYANCE 1.

INSOLVENT DEBTOR.

Insolvent debtor—Preferential assignment—Pressure.—V. who was a practising attorney and also Clerk of the Peace and County Attorney, having been ordered to pay over certain moneys, or in default be struck off the roll of attorneys, made an assignment of his emoluments as

County Attorney to H., W., and J. to secure the amount which he had been ordered to pay their client, at the same time telling H., W., and J. that he would leave it to them to hand him back such part as they chose on which to live, such an assignment being generally executed at the beginning of each quarter, upon which they drew the amount coming from the county and handed V. back a portion to live on. Subsequently V. recovered a judgment in favour of a client, on which costs were taxed in his favour at \$164, which he also assigned to secure the same claim. About a month afterwards the plaintiff G., as an execution creditor, obtained an attaching order.

Held, [affirming the judgment of Senkler, Co. J.] that the existence of the order held by H., W., and J. was a sufficient pressure to prevent the assignment executed by V. being considered a preference within the meaning of the Act (R. S. O. ch. 118). *Grant (Judgment Creditor), Appellant, and VanNorman (Judgment Debtor).*—*Bacon and Knowlton (Garnishees), and Kinney (Claimant), Respondent*, 526.

INSURANCE COMPANY.

See WINDING UP ACT, 3.

INTERPLEADER SUIT.

Interpleader suit—*Claimant not appearing—Judge's decision final.*—The plaintiff, a Division Court bailiff, having seized a quantity of wheat under a warrant of execution against one P., which the defendant claimed, an interpleader summons issued, and on its return was

adjourned with leave to the defendant to file his claim in fifteen days. Afterwards the case came up for final hearing, when the Judge made this order, "the claimant not having put in his claim or complied with the order above made is barred and is ordered to pay the costs in fifteen days." The plaintiff, as such bailiff, thereupon brought this action to recover the wheat, which the defendant had obtained possession of pending the summons :

Held, on appeal [affirming the decision of the County Court Judge] that the minute so made by the Judge in the interpleader issue was equivalent to stating that the claim was dismissed and was final and conclusive upon the defendant, and that he could not be heard to say that the bailiff had not seized the wheat. *Hunter v. Vanstone*, 750.

See also MARRIED WOMAN.

JOINDER.

See PARTIES.

JOINT STOCK COMPANY.

See SCIRE FACIAS, 1.

JUDGE'S DECISION FINAL.

See INTERPLEADER SUIT.

JUNIOR COUNSEL.

Junior counsel are not at liberty to take positions in argument which conflict with those taken by their leaders. *The International Bridge Co. v. The Canada Southern Railway Co.*, 226.

JURY, SUBMITTING QUESTIONS TO.

See PRACTICE, 1.

LIFE INSURANCE.

Life policy—Overdue premium—Payment — Forfeiture of policy—Waiver of forfeiture.—By a policy of insurance upon the life of J. N. it was stipulated that if any premium should not be paid when due, the consideration of the contract should be deemed to have failed, and the company released from liability. By another clause, if an overdue premium was received, it was to be upon the express condition that the assured was in good health, &c., and if the fact were otherwise, the policy should not be put in force by such receipt. A check was given for a quarterly premium, with the request to hold it for a few days, as there were not then funds, which was received by the agent, but the premium receipt was not given up. It was afterwards presented but not accepted. On the 21st October, funds were provided, but it being then after banking hours, the cheque was not presented. That night J. N. was killed.

Held, affirming the decision of the Court below (45 U. C. R. 593), that the policy lapsed the day after the premium fell due; that nothing but payment could then revive the policy and that there was not any evidence of payment, or of anything dispensing with it. *Neill v. Union Mutual Life Ins. Co.*, 171.

LANDLORD AND TENANT.

Landlord and tenant—Eviction—Surrender.—In an action to recover

a year's rent on a covenant in a lease for three years, it was shewn that the defendant had harvested the crops on the farm, and that they, together with the barn and stable, were destroyed by fire before the expiration of the year, and that he was paid the insurance money; whereupon he left the farm, and the plaintiff entered, ploughed, and put in a crop. The plaintiff afterwards applied on several occasions to the defendant for payment of the rent, when the defendant said he had not any money. It was shewn that a proposition had been made to leave the matter to arbitration.

Held [affirming the judgment of the Judge of the County Court of Peel], that the acts of the plaintiff did not amount to an eviction, that there was not evidence to support a surrender in law, and that the plaintiff was entitled to recover; *BURTON and PATTERSON, JJ. A., dubitante. Nixon v. Naltby*, 371.

See also STATUTE OF LIMITATIONS.

LEASE FOR LIFE.

See LIFE LEASE.

LEASE, SHORT FORM OF.

Lease, short form of—Covenants not statutory—Covenants running with land.—In a lease, expressed to be made in pursuance of the Act respecting short forms of leases, the covenants, in place of the words "the lessee covenants with the lessor," were commenced with the words "the said party of the second part covenants with the said party of the first part." Then followed covenants representing the statutory

short form covenants, and a covenant to build a house on the demised premises; and another covenant to rebuild in the event of the building so erected during the term being destroyed by fire. This last covenant was introduced by the words, "and the said party of the second part further covenants with the said party of the first part."

The lessee, with the assent of the lessor, assigned the lease, and the assignee built in pursuance of the covenant, and executed a mortgage to the defendant, and on the buildings being burnt down re-built them. Subsequently the defendant, on default of payment, sold, under the power in his mortgage, to one N., who assigned the leasehold interest in the property to the defendant, and thereafter the buildings, during the occupation of the defendant, were again destroyed by fire.

Held, (1) that the covenant to rebuild derived no aid from the statute, and was to be read as made by the lessee for himself alone and not for his assigns, and the decree of *BLAKE, V. C.*, 27 Gr. 420, was reversed; *SPRAGGE, C. J.*, *BURTON*, and *MORRISON, JJ. A.*, holding that the covenant being in respect of something not *in esse* at the making of the lease did not run with the land, and did not bind the defendant: *PATTERSON, J. A.*, dissenting, on the ground that the building having been erected before the assignment to the defendant, the covenant ran with the land, and bound him:

Held, (2) by *SPRAGGE, C. J.*, *BURTON* and *MORRISON, JJ. A.*, that the covenant to build not being one of the statutory covenants, must be read as being made by the lessee for himself alone and not for his assigns:

Per PATTERSON, J. A.—That the short form words introductory to the covenants should be read as if extended in the long form upon the deed; and therefore the words "for himself, his executors, administrators, and assigns" applied to the covenant to build, though not to the covenant to re-build.

Per PATTERSON, J. A.—The use of the words "party of the first," and "party of the second part," inserted in the introductory part of the covenants was a sufficient compliance with the provision of the statute, in respect to short forms of leases, which says that any *name or names* may be substituted for the words "lessor" and "lessee." *Emmett v. Quinn*, 306.

LIBERTY TO BID AT SALE.

See TRUSTS, &c., 1.

LICENSE COMMISSIONERS.

Delegation of powers of legislation to.—*See BRITISH NORTH AMERICA ACT, 1.*

LIFE LEASE.

Life Lease—Proviso for re-entry—Ejectment.—The defendant leased to his father the lands in question in this action for life, to work and enjoy the same, but that should the father in his later years become incapable of taking charge of the place as it should be by good husbandry, then and in such case the defendant was to be at liberty to govern the lands as seemed best to him. And in the event of the father becoming incapable of manual labour he was

to be supported by the son, and it was agreed that, subject to the son's rights, the father was entitled to peaceable and quiet possession. The father became incapable of taking proper care of the place, and in consequence the defendant re-entered and worked the farm. Subsequently thereto the interest of the father was sold by the sheriff to the plaintiff, who brought ejectment. The jury having found the facts as above stated :

Held [reversing the judgment of the Court below], that the defendant had, according to the terms of the lease, the right to possession, and that the plaintiff must therefore fail in his action. *Turley v. Benedict*, 300.

LIQUOR, SUPPLYING— AFTER NOTICE NOT TO DO SO.

See TAVERN KEEPER 1.

LOAN COMPANY.

Loan company—Public announcement of company's rule—Payment of mortgage pursuant to—Retrospective rule.]—A circular was issued, with the knowledge of the directors of the defendants' Co., which, amongst other things, set out that "loans can be paid at any time and a discharge of the mortgage will be given, the rule of the society being, when this privilege is taken advantage of, to charge three months' additional interest at the same rate at which the loan was made." The plaintiff saw this circular exposed in the office of an appraiser of the company through whom the loan was effected, and was thereby induced to mortgage his land for twenty years, the loan to be repayable on the instalment plan.

Held, (affirming the decree of the Court below,) that the plaintiff could insist on redeeming his mortgage according to the terms set forth in the circular, such right being sustainable either on the footing of the contract evidenced by the mortgage, the effect of which was to incorporate the rules of the society, while the evidence shewed that what was put forward in the circular as the rule of the society, was one of the rules referred to in the mortgage ; or on the footing of a collateral and independent contract.

Held, also, that, although the mortgage recited that the mortgagor was a member of the society, having subscribed for eighty-eight shares of the stock, which the society had agreed to pay him in advance on receiving that security therefor, &c., yet without express stipulation to that effect, the mortgagor could not be affected by rules made subsequently to the execution of the mortgage, even if he could under the system under which the operations of the society were carried on be considered a member when he had received the amount of his shares ; but that at all events his liability could not be extended beyond the clear words of his contract, which did not point to any but the existing rules. *Hodgins v. The Ontario Loan and Debenture Co.*, 202.

MARRIAGE.

See FRAUDULENT CONVEYANCE.

MARRIED WOMAN.

Married woman—Interpleader.]—The plaintiff, who had been married in 1864, cultivated land, living upon

it with her husband and working it under his advice, one-half of which had, in 1874, been devised to her by the father of her husband, the other half having been in like manner devised to her son. In an interpleader action brought by her against an execution creditor of her husband:

Held (affirming the judgment of the Court below, 46 U. C. R. 52), that the plaintiff was entitled to the crops on the whole farm as against the execution creditor. *Ingram v. Taylor*, 216.

MASTER, REFERENCE TO.

[OF QUESTIONS PROPER FOR COURT.]

Where a question is directly raised by the pleadings, and is distinctly presented to the Court for its decision, and evidence has been given upon it in order to obtain the judgment of the Court, it will not be referred to the Master for his decision.

Held, therefore, that it was not proper to refer to the Master the inquiry as to the reasonableness of tolls charged. *The International Bridge Co. v. The Canada Southern R. W. Co.*, 216.

MINISTER OF AGRICULTURE.

Quere, as to the effect under section 28 of the 35th Victoria, ch. 26 (D.), of a decision of the Minister of Agriculture. *Smith v. Goldie et al.*, 628.

MISDIRECTION.

See PRINCIPAL AND AGENT, 2.

MORTGAGE, MORTGAGEE, MORTGAGOR.

1. *Mortgage—Equity of redemption—Indemnity.*—B. owned lots D. and E. and mortgaged them. The mortgagee (J.) assigned the security and afterwards bought up the equity of redemption. P., the plaintiff, subsequently purchased lot D for which he paid the full value and obtained a conveyance containing statutory covenants for title and possession. J. subsequently sold lot E. to a *bonâ fide* purchaser, who conveyed to the appellant:

Held, affirming the judgment of the Court below (28 Gr. 356,) that P. was entitled to be indemnified out of lot E to the full extent of the value thereof against the amount due on the mortgage. *Pierce v. Canavan et al.*, 187.

2. *Mortgage—Purchase of part of mortgaged estate—Purchaser.*—M., who was the owner of Whiteacre and Blackacre, both subject to incumbrances of \$1,600 and \$500, sold Whiteacre to C. subject to the \$1,600 mortgage, with covenants for title, save as to that mortgage, the mortgage debt in reality being the consideration or purchase money therefor. M. afterwards sold Blackacre to N., subject to the \$500 mortgage, which conveyance also contained absolute covenants for title, the payment of the \$500 being taken as part of the consideration. Default having been made in payment of the \$1,600 mortgage, the mortgagee proceeded to a sale under the power, and N. became the purchaser of both parcels with a view of protecting himself, and thereupon took proceedings to compel M. and the representatives of C. to pay the amount due on the \$1,600 mortgage.

Held, affirming the judgment of the Court below (28 Gr. 334), that there was not any privity between the plaintiff and C.'s representatives, and that the demand remained with M., the original vendor, against C.'s estate. *Norris v. Meadows*, 237.

See also LOAN COMPANY.

MUNICIPAL ELECTIONS.

See QUO WARRANTO.

NEGLIGENCE.

See FIRE.

NON-DISCLOSURE OF CAUSES OF INSOLVENCY.

See INSOLVENT ACT, 2.

NON-DISCLOSURE OF SURETY.

See PRINCIPAL AND SURETY, 1.

NOTICE.

See CHATTEL MORTGAGE, 5.

NOTICE OF DISHONOUR.

See PROMISSORY NOTE, 1.

OVERDUE PREMIUMS.

See LIFE INSURANCE, 1.

OWNERSHIP OF STOCK.

See PARTNERSHIP ARTICLES.

PAROL EVIDENCE.

See ASSIGNMENT FOR BENEFIT OF PARTNERSHIP CREDITORS.

PARTIAL FAILURE OF CONSIDERATION.

See PRINCIPAL AND SURETY, 1.

PARTIES.

Parties — Joinder — Rule 94.—The plaintiff shipped goods from St. John's, Quebec, to Dundas, Ontario, by way of the defendant Railway Companies' lines, and they arrived at their destination in a damaged state. The plaintiff, being in doubt as to which company was liable, joined both as defendants.

Held, affirming the order of Proudfoot, J., who had affirmed the order of Mr. Dalton, Master in Chambers, 9 P. R. 80; that the case came within Rule 94, and that the plaintiff had a right to make both companies parties. *Harvey v. Grand Trunk R. W. Co. and Great Western R. W. Co.*, 715.

PARTNERSHIP ARTICLES, CONSTRUCTION OF.

Partnership articles, construction of — Ownership of stock — Law of Quebec — Reformation of articles — Practice — Reference back to Court to take evidence after refusal to call witnesses.—The plaintiff and defendants M., having on hand large contracts to fulfil, entered into partnership with the defendant W, under the style of J. W. & Co. The articles of agreement, which were drawn in the Province of Quebec,

declared that the plant, which the plaintiff contributed to the partnership, should become the property of the said firm, that is to say, "the one-half thereof shall revert to and belong to the plaintiff and defendants M., and the other half to W." The law of Quebec was proved to be that if nothing were provided by the articles as to the ownership of the plant, it would be taken out of the partnership at the conclusion of the same by the party who had contributed it, before division of profits. The plaintiff and the defendants M., all swore that the intention was, that they should receive credit for the plant as their property in the accounts of the partnership. It was shewn also that in the treaty for the partnership inventories of the plant were drawn and its value was discussed, the plaintiff putting it at \$57,130, W. consenting to it being placed at \$40,000. The notary who drew the articles swore that if it had been intended to make a transfer of the property in the plant, he would have expressed such intent more explicitly. The book-keeper swore that the plaintiff had claimed credit in the books for the plant from the first, and that in discussing the matter with W. a reason had been suggested for not immediately giving such credit that the plant was under mortgage.

Held, that upon the true construction of the articles of partnership as drawn, the plant was withdrawn from the operation of the law of Quebec as proved, its ownership being expressly provided for by the instrument: but that the evidence given by the parties other than W. was clear and satisfactory, that a mistake had been made in drawing the same, and that the articles should

have been reformed so as to entitle the plaintiff to credit for the plant in taking the accounts; and on this ground the judgment of the Court below was reversed. *Macdonald v. Worthington et al.*, 531.

PARTNERS.

Partners—Principal and surety—Giving time to principal.]—H. & M. were carrying on business in co-partnership, and H. becoming dissatisfied with the manner in which the business was conducted, a dissolution was agreed upon, in October, 1875, with the knowledge and approval of the plaintiffs, one of them having assisted in arranging it, H. retiring and assigning to M. his interest in the partnership assets, in consideration of \$1,332, for which M. gave his promissory notes at three, six, nine, and twelve months, and bound himself to pay all the debts of the co-partnership. M. continued to carry on the business, and in doing so had several transactions with the plaintiffs, from whom he continued to receive goods on credit, giving promissory notes for the price, as well as to cover the firm's indebtedness, during which time the plaintiffs rendered periodical statements to M.—ignoring apparently the existence of H.—in which the liabilities of the firm and M. were embraced; although expressed "M. and H. Liability," giving the items, and "J. M. Liability," also detailing the items. M. by means of contra accounts against H. had reduced the latter's claim to about \$400. In November or December, 1876, the plaintiffs applied to H. to renew the partnership notes, but this he declined to do on the ground that he was not

liable, notwithstanding which the plaintiffs continued to deal with M. until he became insolvent in January, 1880, when they instituted proceedings against both partners to recover their claim.

Held [PATTERSON, J. A., dissenting], reversing the finding of Cameron, J., that the effect of the dealings between H. and M. was not to constitute H. a surety for M. and that he and M. remained liable to the plaintiffs for the partnership debts. *Birkett et al. v. McGuire et al.*, 53. [Reversed by Supreme Court 19th June, 1883.]

PATENTABLE INVENTION.

1. *Patentable invention.*—The plaintiff claimed as his invention, for the purpose of purifying flour during its manufacture, a bolting cloth or sieve, through which a current of air was forced upwards by means of an air chamber and a fan, or substitute therefor, and, in order to keep such sieve from becoming clogged, a brush, or a number of brushes, arranged in such a manner as to traverse the under surface. The air chamber and the fan combined with the bolt or sieve were admittedly old; and it appeared that one B. had patented a machine which was in use in the manufacture of semolina, in which a similar brush arrangement was in use for the purpose of keeping open the meshes of the sieve when used.

Held, (affirming the judgment of Spragge, C.), that the plaintiff's invention was not patentable. *Smith v. Goldie et al.*, 628.

[Reversed by Supreme Court 19th June, 1883.]

2. *Quære*, as to the effect under sec. 28 of the 35th Vic. ch. 26, D. of a decision of the Minister of Agriculture. *Id.*

PAYMENT OF MORTGAGE.

See LOAN COMPANY, 1.

PAYMENT, TIME OF.

See CHATTEL MORTGAGE, 3.

POSSESSION.

[CONSTRUCTIVE AND ACTUAL AND VISIBLE.

See STATUTE OF LIMITATIONS, 2.

PRACTICE.

1. *Fire—Negligence—Jury, submitting questions to—Practice.*—The R. S. O. ch. 50, sec. 264, makes it imperative upon the jury to answer questions submitted to them, and prohibits them from giving a general verdict instead. But the Judge after having put questions, may, nevertheless, in his discretion receive a general verdict. *Furlong v. Carroll*, 145.

2. Under Rule 321, O. J. A., the Court may, upon motion for judgment or for a new trial, if satisfied that it has before it all the material necessary for finally determining the question in dispute * * give judgment accordingly: but

Per WILSON, C. J.—Unquestionably that power must be most sparingly and cautiously exercised. *Stewart v. Rounds*, 515.

3. At the trial counsel for the defendant objected that there was no sufficient case made out upon one branch of the plaintiff's claim, the rectification of an agreement. The defendant's counsel thereupon de-

clined to argue the point until the evidence was closed, and the defendants then called one witness upon another point; as to the rectification, the learned Judge ruled that the plaintiff had made out no case—and as to the other points he decided in defendants' favour, and dismissed the bill, with costs.

Thereupon the plaintiff appealed to this Court and the decree was reversed and the relief prayed for given to the plaintiff. *Macdonald v. Worthington et al.*, 531.

4. On settling the certificate of judgment the solicitor for the defendants objected to that part of it which directed the taking of the accounts between the parties, and that credit should be given for \$40,000, the value of the plant, &c., seeking to have the action remitted to the Court below, in order to conclude the trial, and take such evidence as the respondent might adduce in support of his defence, and moved the Court to vary the certificate accordingly.

Held, that the defendant was bound by the course which he had elected to adopt, and the application was refused, with costs. *Ib.*

5. A cause had been carried down to trial in 1879, when it was postponed at the instance of the defendants, and a trial took place in 1880, when a verdict was rendered in favour of the plaintiffs, which the Court of Queen's Bench refused to set aside. The defendants, thereupon appealed to this Court, and when the appeal came on to be heard (in 1882) an application was made by the defendants to be allowed to adduce evidence alleged to have been recently discovered, tending to relieve the defendants from liability,

which evidence it appeared, consisted mainly of entries in the books of the defendants.

The Court being of opinion that proper diligence had not been used by the defendants, as in such case they must have discovered the evidence at a much earlier date, refused the application with costs. *Murray The Canada Central Railway Co.*, 646.

See also ACCIDENT POLICY, 3.
COUNTY COURT APPEAL.
PRINCIPAL AND AGENT, 2.
WINDING-UP ACT, 1, 2.

PREFERENTIAL ASSIGNMENT.

See INSOLVENT DEBTOR.

PRESSURE.

See INSOLVENT DEBTOR.

PRESUMPTION OF INNOCENCE.

See INSOLVENT ACT, 1.

PRINCIPAL AND AGENT.

See TAVERN KEEPER, 1.

Principal and agent—Agency to sell will not authorize agent to exchange goods of his principal—*Replevin*—*Practice*—*Order xxxvi—Rule 321, J. A. O.*—The plaintiffs delivered to one R. some cultivators for the purpose of selling, as their agent, for cash or good notes. Three of these he exchanged with the de-

defendant, who was aware of the fact of agency, for a buggy, which he sold and retained the proceeds. It was shewn that on a previous occasion R. had traded a cultivator with one M. for a horse, which he sold, and gave the plaintiffs a forged note purporting to be that of the purchaser; and on the same day he traded another cultivator with one D., for a watch and \$7, but for this also it was said he returned a note to the plaintiffs. It was not shewn that defendant knew of either transaction, and the plaintiffs had prosecuted R. for the forgery. In an action of replevin the jury gave a verdict in favour of the defendant, but the County Judge in term set it aside, and directed judgment to be entered for the plaintiffs, which, on appeal, was affirmed, with costs. *Stewart et al. v. Rounds*, 515.

2. The plaintiffs entered into a contract with one F. to fence an extension of the defendants' railway. F. was a shareholder of the defendants' company, and general manager of that part of the road which was in operation, and was contractor for the construction of the extension. The only writing between the parties was the following informal memorandum, prepared by one of the plaintiffs:

"RENFREW, 6th Jan., 1876.

"MEMORANDUM of fencing between Muskrat river east to Renfrew; T. & W. Murray to construct same next spring, for C. C. R. R. Co., to be equal to 5 boards 6 inches wide—posts 7 to 8 feet apart—for \$1.25 per rod. Company to furnish cars to distribute lumber.

"T. & W. MURRAY,

"A. B. FOSTER."

During the progress of the work F. drew drafts on the company, in

favour of the plaintiffs, which were accepted and paid by them. They also allowed the plaintiffs to retain various sums due by them to the company as freight, charging the amounts at stated periods to F. and releasing the plaintiffs, who were in turn charged with the amounts by F.

The jury were asked whether the plaintiffs, when they made the agreement, supposed that they were contracting with the company, and were told that, though F. was not the agent of the company to make the contract, yet if he professed to be acting for the company and working in the company's name, it would be binding on the company, unless they repudiated it; and they were asked whether the company had adopted the contract, by paying money or allowing freight.

Held, per SPRAGGE, C. J. O., and BURTON, J. A.—That there was misdirection, as it was immaterial what the plaintiffs understood if F. had not authority in fact to make the contract; and that there could be no ratification or adoption of the contract by the company, unless they were, at the time, aware that it had been entered into by F. professedly as the agent of the company; and

Held, also, that the payments, whether by money or the allowance of freight, were not any evidence of adoption in the absence of such previous knowledge:

Held, also, that there was no evidence to go to the jury that F. so acted, or professed to act, and that the plaintiffs should therefore have been nonsuited.

OSLER, J., dissented, on the ground that there was no misdirection, and that the appellants had failed to convince him that the unanimous judgment of the Court below was wrong.

MORRISON, J. A., agreed with Osler, J.

The Court being thus equally divided, the appeal was dismissed, and the judgment of the Queen's Bench stood affirmed. *Murray et al. v. The Canada Central Railway Co.*, 646.

[Affirmed by Supreme Court May, 1883.]

PRINCIPAL AND SURETY.

Principal and surety — Non-disclosure to surety — Bill of exchange — Partial failure of consideration. — The defendant agreed with the plaintiff that whatever goods P. should order of the plaintiff he would become surety for. P. sent a written order to the plaintiff, who, in addition to the goods ordered, sent others and the whole consignment was invoiced at prices higher than those quoted by the plaintiff, and than those at which P. had ordered some of the goods. Without disclosing these facts to the defendant, but in perfect good faith, the plaintiff presented a bill of exchange upon P. for signature by the defendant, who signed the same supposing that it was for the price of the goods as ordered. P. accepted the bill and kept the goods.

Held, reversing the judgment of the Queen's Bench, 45 U. C. R. 382, that the defendant was liable to the extent of the goods ordered, and that the consideration for the bill failed as to the excess only. *Barber v. Morton*, 114.

See, also, PARTNERS.

PROFITS, RECEIPT OF.

See STATUTE OF LIMITATIONS, 1.

PROMISE TO PAY DEBT OF ANOTHER.

See STATUTE OF FRAUDS.

PROMISSORY NOTE.

1. *Promissory note — Notice of dishonor — Renewal — Principal and agent.* — Where the holder of a note employs a notary to protest the same at maturity, it is his duty to give the notary all the information that he is possessed of as to the names and residences of the indorsers. Therefore, where the signature of an indorser was so peculiar that no one unacquainted with it could decypher it, although the holder of the note was well acquainted with the signature, and aware of the party's residence, both of which he omitted to communicate to the notary, who when protesting the note made, or as near as might be, a *fac simile* of the signature, and so addressed the notice of dishonor to "Belleville, P.O.," but the indorser swore that the notice never reached him, though resident in Belleville.

Held, [affirming the finding of Cameron, J.,] that the indorser was discharged. *Baillie v. Dickson*, 759.

2. The note upon which this action was brought had not been properly stamped, and it was urged that it could not be a payment or satisfaction of one of which it was intended to be a renewal.

Held, that the plaintiff being aware of the objection to the unstamped note, and receiving it in lieu of the paper which he held, could not urge this as an objection, he having declared upon it as a promissory note. *Id.*

PUBLIC SCHOOLS ACT.

Public Schools Act—Contract of Trustees.—In an action by a school teacher to recover damages as for a wrongful dismissal, it was shewn that the agreement to employ the plaintiff was made in writing, under seal and signed by two, of the three school trustees, but not at the same time or at any meeting of the trustees called for the purpose of transacting school business.]

Held, reversing the judgment of the County Court, (Haldimand,) that the agreement was void under sec. 97 of the Public Schools Act, which provides that "No act or proceeding of a school corporation which is not adopted at a regular or special meeting of the trustees, shall be valid or binding on any party affected thereby." *Lambiere v. The School Trustees of Sec. No. 3, South Cayuga*, 506.

PURCHASER FROM MORTGAGEE.

See CHATTEL MORTGAGE, 1.

PURCHASE OF PART OF MORTGAGE ESTATE.

See MORTGAGE, 2.

QUEBEC, (LAW OF.)

See PARTNERSHIP ARTICLES, &c.

QUO WARRANTO.

Quo warranto—Municipal elections—Appeal.—The Judge of the County Court ordered a writ of *quo warranto* to test the validity of the

election of an alderman; and subsequently, before appearance entered to the writ, set aside all proceedings in the matter for irregularity. The relator thereupon applied in Chambers for a *mandamus* to compel the County Judge to try the case, when the presiding Judge (Hagarty, C. J.) refused the writ: and on motion in *banc*, the Court affirmed his ruling (see 8 P. R. 497, 46 U. C. R. 175.)

On appeal from this judgment, the appeal was dismissed on the ground that the order of the County Judge, if he had authority to make it, was not subject to review: and if it could be reviewed the application should have been to the Court, not to a Judge in Chambers, as here; and under all the circumstances the appeal was dismissed, without costs.

The writ of *quo warranto* having been issued and served, the County Judge had not power to set it aside. *Regina ex rel. Grant v. Coleman*, 619.

RAILWAY CHARTER, RENEWAL OF.

Railway charter, renewal of—Conveyance of land—Descriptio personæ.]

—The P. & C. L. R. Co., incorporated in 1855, by 18 Vict. ch. 194, had acquired the land in question as part of their road-bed. In 1865, its charter expired, the road not having been put in operation. In 1866, 29 & 30 Vict. ch. 98, was passed, by which the road was to be sold at auction, the Act of incorporation was revived, and the time for completing the railway extended for five years from the passing of the Act, and there was a further provision for sale under order of the Court of Chancery. Within the five years a conveyance was executed to the

defendant company, which took possession, but did not use the land till a short time before the suit. In 1872, the C. P. & M. R. & M. Co. filed a map and book of reference of a proposed extension of their line over the land in question, and constructed part of their road thereon, but ceased in 1873. In 1880, under 43 Vict. ch. 54, O., the C. P. & M. R. & M. Co. leased to the plaintiff company the land in question, and this action was brought to recover possession thereof.

Held, affirming the judgment of the Court below, that the partial construction of their road by the C. P. & M. R. & M. Co. in 1872, was an act of trespass: that the defendant company, under the reviving Act and conveyance in pursuance thereof, acquired a title to the land: that the power to sell by order of the Court of Chancery was permissive merely: that their right to the land was not forfeited by non-completion of the work on the land within the five years, and therefore that the plaintiff company should not succeed. *Grand Junction R. W. Co. v. Midland R. W. Co.*, 681.

RAILWAY COMPANY.

Railway company—Grant of land in consideration of erecting a station—Form of conveyance.—The plaintiff agreed with the contractors for the building of a railway, to convey to them in fee simple six acres, to be increased to ten if necessary, in consideration of their placing the station for the town of Prescott thereon. After the road had been surveyed and the station buildings erected on the property, the plaintiff

executed a conveyance thereof to the contractors which contained a covenant by them to continue and maintain the station on those lands from thenceforth, but the deed was never executed by the grantees. The company continued to use such station for about ten years, when they removed it to a distance of one and a-half miles.

Held, reversing the judgment of the Court below (28 Gr. 583), that the act of the company in thus placing and using the station was a substantial compliance with the agreement, and that they were not bound to continue that station there for all time.

Per HAGARTY, C. J., *semble*, that upon the defendants ceasing to use the lands for the purpose for which alone they had been conveyed, the grantor would be at liberty to resume possession.

Per PATTERSON, J. A., that even if the plaintiff were entitled to claim such possession, in consequence of the company ceasing to use the lands for the purpose for which alone it had been conveyed, the fact that the company had resumed the use and occupation during the progress of the cause would be considered a material fact upon an application to alter the frame of the bill in order to ask that relief; and under the prayer for general relief the Court would not determine that the plaintiff was entitled to re-enter, even though facts apparently sufficient to justify such a decree might be alleged in the pleadings and deducible from the evidence.

The proper form of conveyance that should have been used for effecting the plaintiff's purpose suggested. *Jessup v. Grand Trunk R. W. Co.*, 128.

RECEIVER.

See GARNISHING EQUITABLE CLAIM, 1.

RE-ENTRY, PROVISIO FOR.

See LIFE LEASE.

REFERENCE BACK TO COURT TO TAKE EVIDENCE AFTER REFUSAL TO CALL WITNESSES.

See PRACTICE 4.

RE-FILING MORTGAGE.

See CHATTEL MORTGAGE, 1.

REFORMATION OF ARTICLES.

See PARTNERSHIP ARTICLES, &c.

REGISTERING BILL OF SALE,

[FROM MORTGAGEE.]

See CHATTEL MORTGAGE, 1, 2.

RELIGIOUS SOCIETY.

See CHATTEL MORTGAGE, 5.

RENEWAL.

See PROMISSORY NOTE, 2.

RENT, IMPROVEMENTS IN LIEU OF.

See STATUTE OF LIMITATIONS, 1.

REPLEVIN.

1. *Replevin—Fraudulent Purchase—Disaffirming Sale.*—M., by false representations, induced T. to sell to him a horse, buggy, and harness, and to take for them two promissory notes. T. having discovered the fraud, went and demanded back his goods, at the same time throwing the notes on the table. On the assurance of M. however, that on the following Tuesday he would bring the property or satisfaction, T. again took the notes and went away. M. did not appear as he had promised, and T. sued out a writ of replevin against M., but before it had been executed, M. sold the property to plaintiff, an innocent purchaser, who, having been deprived of it under the replevin, brought trover against the sheriff :

Held, that the plaintiff was entitled to recover ; that the contract had not been disaffirmed when the writ of replevin issued, and that the mere issue of it was no notice to M. of disaffirmance, and could not affect the plaintiff.

Held, also, following *Great Western Railway Co. v. McEwan*, 28 U. C. R. 528, 30 U. C. R. 559, that the defendant, as sheriff, having taken the property out of the plaintiff's possession, could not justify under the writ of replevin. *Stoesser v. Springer*. 497.

2. *Replevin—Boarding-house-keeper—Distress*—R. S. O. ch. 147—In an action of replevin the defendant, for a second plea, avowed for board due by plaintiff to him as a boarding-house-keeper ; and for a third, avowed for a lien on the goods of plaintiff under R. S. O. ch. 147, sec 2. On the trial, before the Judge of the County Court (York) without

a jury, the evidence as to whether the defendant was the keeper of a boarding-house was contradictory, but the learned Judge decided in favour of the plaintiff, holding that the defendant was not a boarding-house-keeper. On appeal this finding of the County Court Judge was affirmed, although, had the matter come before this Court in the first instance, it would have decided otherwise, and under the circumstances, no costs of the appeal were given to the respondent. *Rees v. McKeown*, 521.

See also PRINCIPAL AND AGENT.

RETENTION AND CONCEALMENT OF PROPERTY.

See INSOLVENT ACT, 10.

RULE 94.

See JOINDER.

SCIRE FACIAS.

1. *Sci. fa.* — *Shareholder* — *Joint Stock Company* — *Illegally issued stock* — The Ontario Wood Pavement Company, incorporated under 27 & 28 Vict. ch. 23, with power to increase by by-law the capital stock of the company so soon as, but not before, the original stock was all allotted and paid up, assumed to pass a by-law increasing the capital stock before the original amount had been paid up. The plaintiffs, execution creditors of the company whose writ had been returned unsatisfied, instituted proceedings by way of *sci. fa.* against the defendant as holder of shares of the new or increased capital stock.

Held, [reversing the judgment of the Court below] that the by-law so passed by the company being *ultra vires*, the alleged shares of the defendant had not any existence in law, and therefore that the plaintiffs failed to establish that the defendant was a shareholder within the statute, and consequently they were not entitled to recover; but the appeal being allowed on a ground not taken in the Court below or assigned as a reason of appeal, the Court refused the appellant his costs in appeal. *Page et al v. Austin*, 1.

2. And *per* CAMERON, J. — *Quære*, whether the defendant might not have shewn that the transfer to him had been made by way of security only so that he was not a shareholder within the words of the statute, and therefore not liable for calls. *Ib.*

SECURITY ON APPEAL.

See WINDING UP ACT, 1, 2.

SEPARATE CREDITORS.

See ASSIGNMENT FOR BENEFIT OF PARTNERSHIP CREDITORS.

SHAREHOLDER.

See SCIRE FACIAS, 1, 2.

STATUTE OF LIMITATIONS.

1. *Statute of Limitations* — *Entry* — *Receipt of profits* — *Improvements in lieu of rent* — *Right of creditors*.] — R. in 1867, permitted the defendant L. to occupy certain lands upon an alleged agreement that in lieu of rent he should make improvements, such

as were required for L.'s trade, but not defined as to extent or value, of which R. would obtain the benefit, and that L. would give up possession whenever R. required it—there being no agreement for any term. R. between 1867 and 1879, went occasionally on the place and spoke with L. about the improvements, telling him to make such improvements as he chose. In 1879 after L. had become financially involved he restored the possession of the premises to R.

Held, [BURTON, J. A., diss.,] that L. could not have set up a title under the Statute of Limitations; nor could the plaintiffs, his creditors, claim the land as having been so acquired by him.

Per SPRAGGE, C. J., and OSLER, J.—The entries of R. in going upon the land, were sufficient to prevent the statute from running: and *per* SPRAGGE, C. J., R. might be said to have been in receipt of the "profits" of the land, through its increase in value by reason of the improvements.

Per PATTERSON, J. A.—The evidence shewed that by the successive improvements made as they were, the relation of landlord and tenant was continued or created anew, even though the improvements to be made were not strictly in lieu of rent, nor could be treated as profits of the land.

Per BURTON, J. A.—L. upon the evidence entered as tenant at will; there was no receipt of "profits" within the meaning of the statute; and no entry inconsistent with the lessee's title; and L. having acquired a title by possession, the land was liable for his debts.

If L. had acquired a title under the statute, his giving up possession again to R. would not revest the estate. *Workman et al v. Robb et al.*, 389.

2. The doctrine of constructive possession has no application in the case of a mere trespasser having no colour of title, and he acquires title under the Statute of Limitations only to such land as he has had actual and visible possession of, by fencing or cultivating, for the requisite period. (CAMERON, J., diss.) *Harris v. Mudie*, 414.

3. Where one of several tenants in common enters and dispossesses a trespasser, he is, as regards his co-tenants, in possession simply as any stranger would be; and such possession does not enure to the benefit of his co-tenants.

Per CAMERON, J.—The act of one co-tenant in so taking possession, would be by virtue of his legal estate, and his so doing would enure to the benefit of his co-tenants; thus giving a fresh starting point for the statute to begin to run against them. *Ib.*

Shepherd v. McCullough, 46 U.C. R. 573, remarked upon, and, as applied to the facts of this case, approved. *Ib.*

See, also, EJECTMENT—GRANT, CONSTRUCTION OF.—TRUSTS, &c., 2.

STATUTE OF FRAUDS.

Statute of frauds—Promise to pay debt of another.—A collateral verbal promise to pay the debt of another, who still remains liable, although founded on a good consideration, is not binding. Therefore where defendant had bought the stock of one A, who was indebted to the plaintiff for wages, and in order to induce the plaintiff to continue with the defendant, the defendant promised to see that he was paid, and the plaintiff did accordingly work for the defendant.

Held, reversing the judgment of the County Court, that the Statute of Frauds was a bar to the action. *James v. Balfour*, 461.

SUNDAY.

See CHATTEL MORTGAGE, 2.

SUPERVISION OF TRUSTS.

See DEVISE TO GOVERNMENT OF FOREIGN STATE.

SURRENDER.

See LANDLORD AND TENANT.

TAVERN KEEPER.

1. *Tavern keeper supplying liquor after notice not to do so—Principal and agent R. S. O. ch. 181—Assessing damages.*—The plaintiff, whose husband was in the habit of drinking intoxicating liquors to excess, gave notice to the defendant, a duly licensed inn-keeper, forbidding him to supply liquor to her husband, in consequence of which the defendant forbade his bar-keeper (his son) furnishing liquor to the husband, but the bar-keeper notwithstanding did serve the plaintiff's husband with liquor in the tavern kept by defendant.

R. S. O. ch. 181, sec. 90 enacts that if the person so notified delivers or suffers to be delivered any such liquors to the person named in the notice, the person giving such notice may recover from him not less than \$20, nor more than \$200, to be assessed by the Court or jury as damages.

Held, that defendant was liable. *Austin v. Davis*, 478.

2. This Court on appeal directed a verdict to be entered for the plaintiff, but referred it back to the Judge of the County Court to assess the damages, declining to follow the course adopted in *Denny v. The Montreal Telegraph Co.*, 3 A. R. 628. *Ib.*

TAVERN LICENCES.

See BRITISH NORTH AMERICA ACT 1, 4.

TIME OF ESSENCE OF CONTRACT.

See CONTRACT 1.

TITLE.

See STATUTE OF LIMITATIONS 2, 3.

TOLLS.

See BRIDGE COMPANY 1, 2.

TRUSTS, TRUSTEE, AND CESTUI QUE TRUST.

Duty of trustee—Liberty to bid at sale.—The plaintiff was mortgagee of certain lands, and by the will of the mortgagor was devisee thereof in trust to pay certain legacies charged thereon—amongst others one to the defendant, an infant about ten years old. Having instituted proceedings against the defendant to enforce payment of the mortgage, the conduct of the sale was given to the guardian of the infant, and the plaintiff had liberty to bid at the sale under the decree as mentioned, 27 Gr. 576.

Held, [reversing the order then made,] that the liberty to bid accorded the plaintiff, who occupied the two-fold character of mortgagee and trustee, was given him for the purpose of protecting his interests as mortgagee, but did not absolve him from the duty which, as trustee, he owed to the infant; and that the conduct of the plaintiff prior to and at and about the sale, as set out in the case, by means of which he had been enabled to make a profit at the expense of the infant *cestui que trust*, was such as would have rendered the sale invalid if the land had remained in his hands; but as it had passed into those of an innocent purchaser the plaintiff should be charged with the outside selling value of the estate at the time of the sale, or pay to the defendant the amount due to him under the will, with interest thereon from the date of the sale, together with the costs of the Court below subsequent to the petition, and also the costs of appeal. *Ricker v. Ricker*, 282.

2. *Devise Trustee - Statute of limitations.*]—A testator directed a sum of money to be invested, the interest whereof was to be employed in endeavouring to discover his brother, to whom the money was to be paid if discovered within five years from the death of the testator, and if not so found the amount to be paid to M. C.

The executors took the bond of the person liable to pay the amount to the estate, and subsequently an instalment payable under such bond was recovered by the executors and paid over to M. C. Afterwards the balance was recovered by one of the executors, who invested it in his business, and sought to defeat a suit to compel payment of the amount

at the instance of the personal representative of M. C., by setting up the Statute of Limitations, more than ten years having elapsed since M. C. had become entitled to the bequest.

Held, [affirming the decree of the Court below, 27 Gr. 307,] that the conduct of the executors constituted them trustees, and that the right to recover the money was not barred by the Statute of Limitations; and that C., into whose hands the money had come, was chargeable with interest from the time of its receipt by him. *Margaret Cameron v. Donald Gampbell*, 361.

UNJUST PREFERENCE.

K. made a transfer of certain securities to a bank within thirty days of his insolvency which was impeached as an unjust preference, but it was sworn that upon the faith of such transfer the bank had made advances to K exceeding the value of the securities so transferred, which would not otherwise have been made.

Held, that the bank had not thereby obtained an unjust preference, and therefore the transaction could not be impeached. *Nelles v. The Bank of Montreal*, 743.

See also *INSOLVENT ACT*, 1, 4, 5.

VOID DEED.

See *ASSIGNMENT FOR BENEFIT OF PARTNERSHIP CREDITORS*.

VOLUNTARY CONVEYANCE

Voluntary conveyance - Independent advice.]—A conveyance of land from a man ninety years old to his

son was prepared on the instructions of the latter, and recited that the son had agreed to pay his father \$10 a month for his life, but no such agreement had in fact been made, and there was no other consideration. The deed was not explained to the father, and the solicitor's clerk, who witnessed it, could not say that he had even read it over to him. There was no direct fraud, but the father, who had become childish, was under the influence of his son and had acted without advice.

Held, affirming the decision of the Court below (27 Gr. 567), that the deed, having been executed without proper advice, should be set aside. *Lavin v. Lavin*, 197.

VOLUNTARY EXPOSURE TO RISK.

See ACCIDENT POLICY, 2.

VOLUNTARY SETTLEMENT.

See INSOLVENT ACT, 8.

WINDING-UP ACT.

1. *Winding-up Act — Practice — Security on appeal — Insurance company.*—An appeal under the Act respecting the winding-up of Joint Stock Companies, 41 Vict. ch. 5, sec. 27, O., cannot be entertained when security has not been given within eight days from the rendering of the

final order or judgment appealed from. *Re Union Fire Insurance Company*, 783.

2. Where a bond good in form with proper sureties was filed with the clerk of the County Court, on the last of the eight days, though not allowed by the Judge.

Held, to be within the words, "given security before a Judge," and a sufficient compliance with the Act, though a person thus filing a bond without allowance risks being deprived of his right of appeal in the event of the bond proving defective. *Ib.*

3. The Act applies to an Insurance Company incorporated by the Province of Ontario, notwithstanding that ch. 160, R. S. O., provides a separate mode of distributing the deposit made by the Company with the Provincial Treasurer. *Ib.*

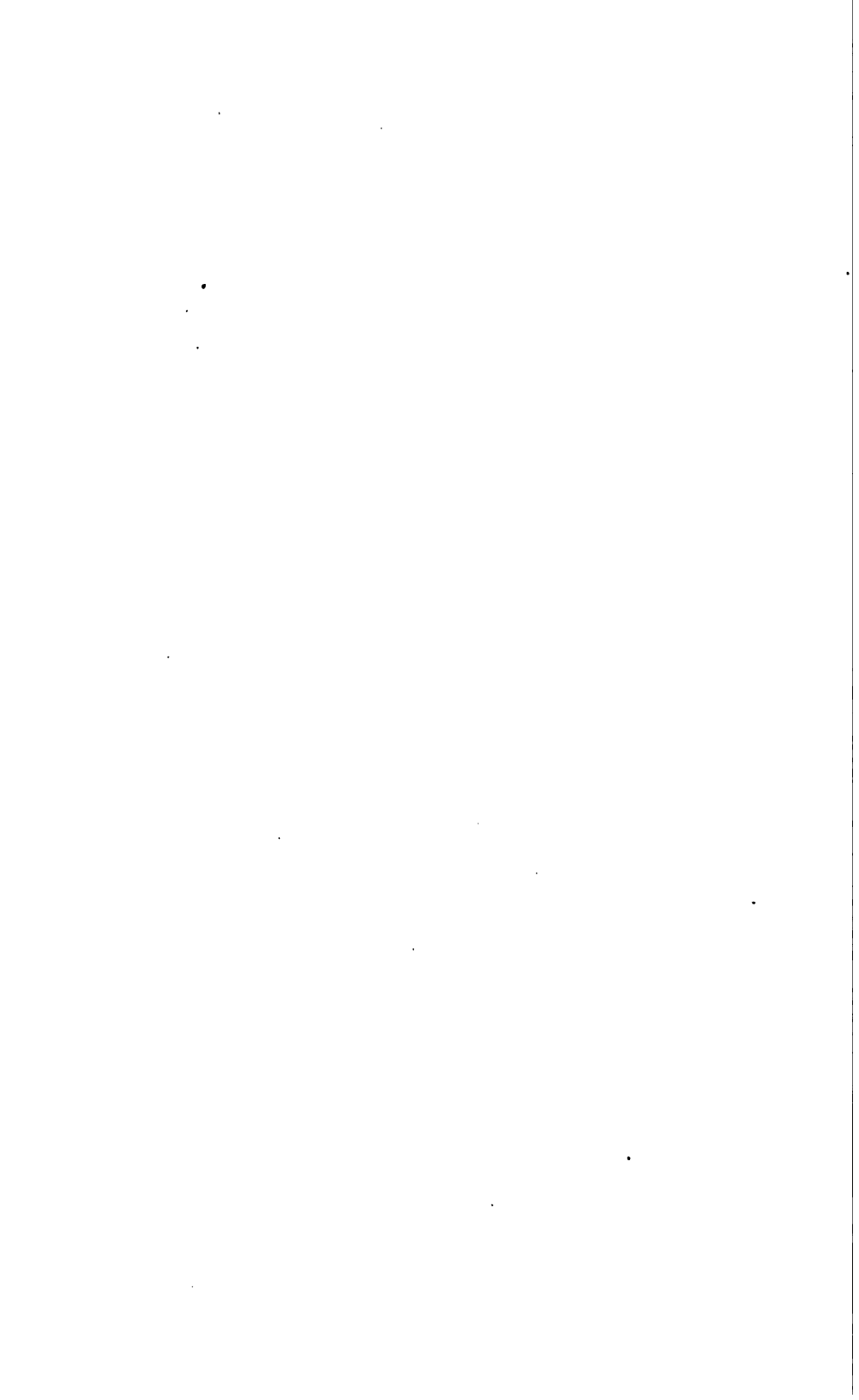
4. An order for compulsory winding-up, may be made under sec. 5, notwithstanding a resolution had been passed by the shareholders of the company, providing for the voluntary winding-up of the affairs thereof under the supervision of the directors of the company, and a committee of shareholders appointed by them for that purpose. This not being an extraordinary resolution under sec. 4, sub-sec. 3, under the circumstances appearing in the judgment:

Held, that the discretion of the Judge appealed from had not been improperly exercised. *Ib.*

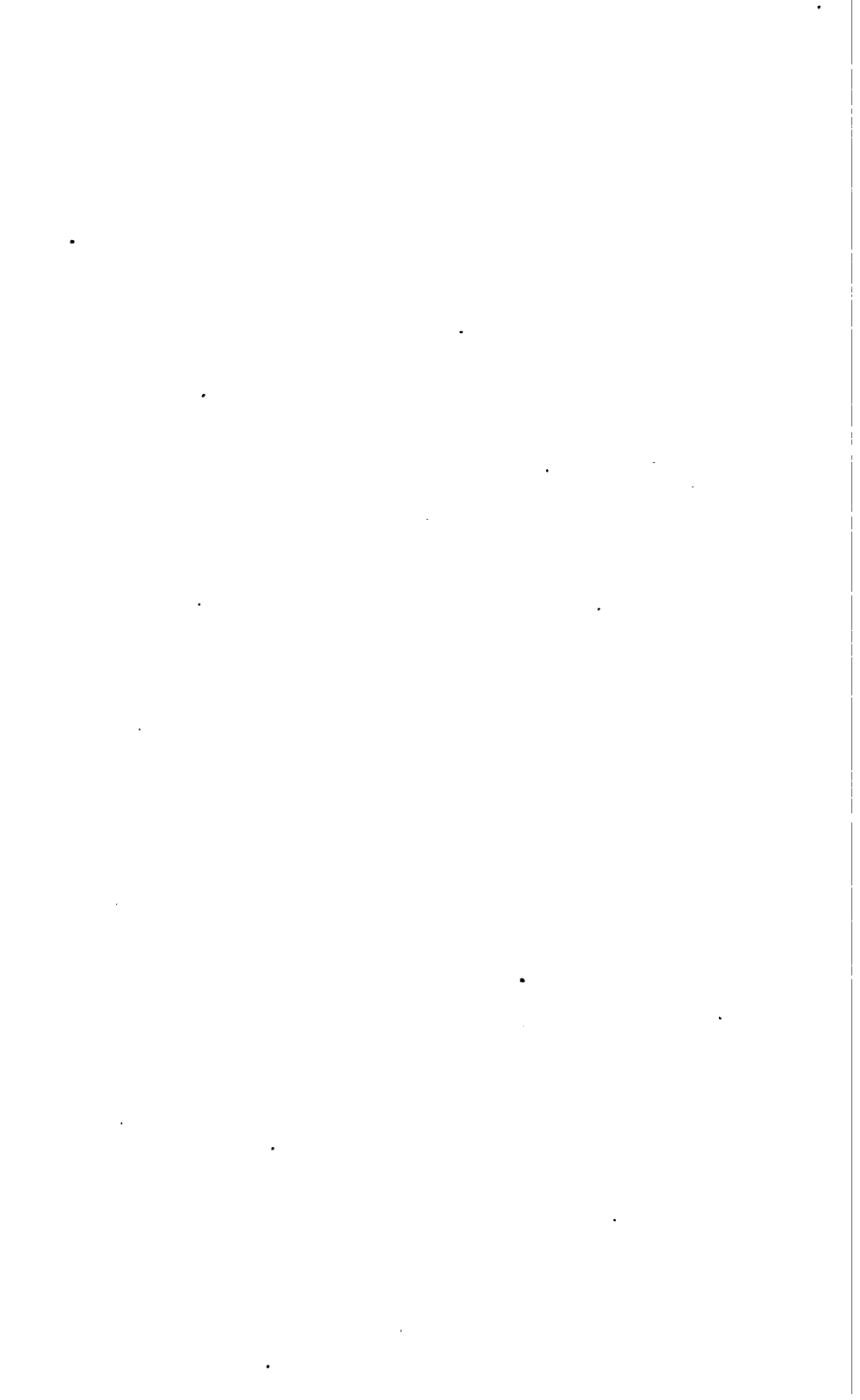
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